SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 514

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE, 23D DISTRICT OF PENNSYLVANIA

vs.

JOHN R. DONNAN, SIDNEY B. DONNAN, ALVAN E. DONNAN, ET AL., ETC.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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In United States Circuit Court of Appeals for the Third Circuit

D. B. Hemmer, Collector of Internal Revenue, 23d District of Pennsylvania, Pittsburgh, Pennsylvania, appellant

vs.

John H. Donnan, Sidney B. Donnan, Alvan E. Donnan, and Dorothy D. Whitworth, Executors and Trustees of the Estate of John W. Donnan, Deceased, of Washington, Pennsylvania, appellees

Appeal from a Judgment of the District Court of the United States for the Western District of Pennsylvania

Before Woolley and Davis, Circuit Judges, and Johnson, District Judge

Filed Nov. 9, 1931

CERTIFICATE TO THE SUPREME COURT

In order that it may properly decide this case, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court. Therefore, under authority of section 239 of the Judicial Code (U. S. C. A., title 28, section 346), it certifies two questions of law which arise from the following facts:

Statement of facts

On March 1, 1927, John W. Donnan transferred by indenture $1,700,000 of securities to trustees for his four children. The transfer was a complete and irrevocable gift inter vivos and without consideration.

On September 15, 1927, he advanced $32,500 to a son, also without consideration.

John W. Donnan died on December 28, 1928. His executors filed an estate-tax return and reported for information purposes the said transfer and advancement. The Commissioner of Internal Revenue found that the value of the properties so transferred and advanced was, at the time of the donor's death, $3,900,863.26 and $32,500, respectively, and assessed an additional estate tax of $294,-196.35. He determined this additional tax by including in the gross estate of decedent the value of the properties transferred and advanced, in excess of the statutory exemption, on authority of the second sentence of section 302 (c) of the revenue act of 1926 (44 Stat. 70, ch. 27; U. S. C. Supp. IV, title 26, section 1094), which, without regard to what the fact may be, provides that "such trans-

fer or transfers (made by a donor within two years prior to h
death [shall be deemed and held to have been made in contempl
tion of death * * *." The executors paid the collector $47
723.87, being twenty per centum of the additional tax and inter
and the balance, being eighty per centum thereof, to the Comm
wealth of Pennsylvania. After claim for refund and its rejecti
the executors instituted this action in the District Court of the Uni
States for the Western District of Pennsylvania to recover
$47,723.87, paid as a Federal estate tax, and interest. The
was tried to the court without a jury. The trial court found as
that neither the transfer in trust nor the advancement was made
contemplation of death, and held the second sentence of sec
302 (c) of the revenue act of 1926 unconstitutional because violat
of the due process clause of the fifth amendment, and also
because repugnant to other sections of the act. From a judgm
for the executors for the full amount of their claim the colle
appealed, raising two questions of law concerning which this co
desires the instruction of the Supreme Court.

Questions certified.

1. Does the second sentence of section 302 (c) of the revenue
of 1926 violate the due process clause of the fifth amendment to
Constitution of the United States?

3 2. If the answer to the first question be in the negativ
the second sentence of section 302 (c) of the revenue act
1926 void because repugnant to sections 1111, 1113 (a), 1117,
1122 (c) of the same act?

VICTOR B. WOOLLEY,
Circuit Judge.
J. WARREN DAVIS,
Circuit Judge.
ALBERT W. JOHNSON,
District Judge.

[File indorsement omitted.]

4 [Clerk's certificate to foregoing certificate omitted in printing.]

[Indorsement on cover:] Enter Attorney General. File No. 36
U. S. Circuit Court of Appeals, Third Circuit. Term No. 514.
Heiner, Collector of Internal Revenue, 23d District of Pennsylva
vs. John H. Donnan, Sidney B. Donnan, Alvan E. Donnan, *et al.*
On certificate. Filed November 11, 1931. File No. 36828.

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 514

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE, 23d District of Pennsylvania

v.

JOHN H. DONNAN, SIDNEY B. DONNAN, ALVAN E. Donnan, et al., etc.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE COLLECTOR

OPINIONS BELOW

The opinion of the District Court upon the demurrer to the plaintiff's statement is reported in 48 F. (2d) 1058. The final opinion of the District Court is not officially reported but may be found in Volume I, Prentice-Hall Tax Service, 1931, p. 1796.

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on November 11, 1931. The jurisdiction of this Court rests on Section 239 of

the Judicial Act as amended by the Act of February 13, 1925.

QUESTIONS CERTIFIED

The questions certified are as follows:

1. Does the second sentence of Section 302 (c) of the Revenue Act of 1926 violate the due process clause of the Fifth Amendment to the Constitution of the United States?

2. If the answer to the first question be in the negative, is the second sentence of Section 302 (c) of the Revenue Act of 1926 void because repugnant to Sections 1111, 1113 (a), 1117, and 1122 (c) of the same Act?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in Appendix A, *infra*, pp. 31–35.

STATEMENT

The certificate sets forth the facts as follows (R. 1–2):

On March 1, 1927, John W. Donnan transferred by indenture $1,790,000 of securities to trustees for his four children. The transfer was a complete and irrevocable gift inter vivos and without consideration.

On September 15, 1927, he advanced $32,500 to a son, also without consideration.

John W. Donnan died on December 23, 1928. His executors filed an estate-tax return and re-

ported for information purposes the said transfer and advancement. The Commissioner of Internal Revenue found that the value of the properties so transferred and advanced was, at the time of the donor's death, $2,200,883.26 and $32,500, respectively, and assessed an additional estate tax of $224,186.25. He determined this additional tax by including in the gross estate of decedent the value of the properties transferred and advanced, in excess of the statutory exemption, on authority of the second sentence of Section 302 (c) of the Revenue Act of 1926 (44 Stat. 70, 27; U. S. C. Sup. V, Title 26, Section 1094), which, without regard to what the fact may be, provides that "such transfer or transfers [made by a donor within two years prior to his death] shall be deemed and held to have been made in contemplation of death * * *." The executors paid the Collector $47,733.87, being twenty per centum of the additional tax and interest, and the balance, being eighty per centum thereof, to the Commonwealth of Pennsylvania. After claim for refund and its rejection, the executors instituted this action in the District Court of the United States for the Western District of Pennsylvania to recover the $47,733.87, paid as a Federal estate tax, and interest. The case was tried to the court without a jury. The trial court found as facts that neither the transfer in trust nor the advancement was made in contemplation of death, and held the second sentence of Section 302 (c) of the Revenue Act of 1926 unconstitutional because

violative of the due process clause of the Fifth Amendment, and also void because repugnant to other sections of the Act.

SUMMARY OF ARGUMENT

I

Whether a particular transfer is in fact made in contemplation of death necessarily involves proof of the state of mind of the donor. Such proof by the Government is inherently difficult and has been found virtually impossible. The difficulty was recognized by Congress from the first in the present series of estate tax laws by including a rebuttable presumption that transfers made within two years of death were in contemplation of death. It then adopted the gift tax. These measures failed to prevent evasions and produced inequalities. Coincident with the repeal of the gift tax Congress, by Section 302 (c) of the Revenue Act of 1926, adopted a conclusive presumption that the excess over $5,000 of all transfers made within two years of death to any one person were made in contemplation of death. This was done only after Congress had exhausted other means of safeguarding the revenue and preventing evasions and after fourteen of the States had found it necessary to adopt similar measures. The purpose of the statute was to make effective the exercise of the constitutional power of Congress to lay an excise tax upon testamentary transfers.

II

The effect of the statute is to include all such transfers in the measure of the gross estate regardless of actual contemplation of death. The ultimate question here is whether, viewed in the light of experience, the shortness of the period intervening between the transfer and death, the ease with which estate taxes are evaded, and the broad powers of taxation granted by the Constitution, the inclusion of such transfers in the measure of the tax is so arbitrary and capricious as to deprive the taxpayer of his property without due process of law.

The inclusion of transfers of the kind here involved is not forbidden by the Constitution merely because they do not technically pass at the decedent's death. Gifts *inter vivos* in contemplation of death are of the same class.

The classification is not arbitrary or unreasonable. It leaves ample room for the ordinary bounty of donors. It is not retroactive. Congress may include innocent articles or activities within a proscribed class if their inclusion is necessary in order to accomplish the purpose to which the law is directed and to prevent its evasion. Congress is the judge of the degree of the necessity which calls forth the statute. The necessity may arise out of difficulty of proof or similarity of objects, or because experience has shown that the thing declared by the statute to be true is so often true that the administration of justice will best be

served by not permitting it to be questioned in any case.

The need to draw a line somewhere is inherent in any classification. The two-year period is justified by "the natural and reasonable inference which may be drawn from the fact that but a short period intervenes between the transfer and death" and is reasonably founded in "the purposes and policies of taxation." No taxing statute has by this Court been held to violate the due process clause of the Fifth Amendment except on the ground of unreasonable retroactivity, and then only because due process prevents an *ex post facto* imposition of a burden upon a right fully exercised. In no case has a classification for tax purposes been held unconstitutional under the Fifth Amendment.

III.

The case of *Schlesinger* v. *Wisconsin*, 270 U. S. 230, may be distinguished. The Wisconsin statute there held invalid included transfers made within *six* years of death, while the statute here includes only certain transfers made within *two* years. This Court has since recognized that it is natural and reasonable to infer that a transfer was made in contemplation of death where but "a short time" intervenes between the events.

The *Schlesinger case* did not repudiate the principle which permits the inclusion of innocent objects within the class to which the law applies. This principle has been recognized by the Court in several later cases, and it is particularly applicable here.

Another distinction is that the Wisconsin statute imposed a succession tax falling on the donee whereas the Federal statute imposes an excise upon the right to transmit and for purposes of taxation includes the value of the transfer in the gross estate to prevent diminution of the estate by transfers made prior to death.

IV

If the statute is constitutional, taxes collected under it are taxes legally assessed and collected; consequently it would not be in conflict with the sections of the Revenue Act which permit recovery of taxes erroneously or illegally assessed and collected.

ARGUMENT

Two questions have been certified for decision by this Court. Points I, II, and III of this brief relate to the first question and Point IV relates to the second.

I

SECTION 302 (c) OF THE REVENUE ACT OF 1926 IS A NECESSARY AND PROPER EXERCISE OF THE POWER OF CONGRESS TO LAY AND COLLECT TAXES, AND IN THE JUDGMENT OF CONGRESS WAS THE ONLY WAY IN WHICH THE EVASION OF ESTATE TAXES COULD BE PREVENTED

Section 302 (c) of the Revenue Act of 1926 provides:

> SEC. 302. The value of the gross estate of the decedent shall be determined by includ-

ing the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. *Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title.* Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act without such consideration, shall, unless shown to the contrary, be deemed to have been made

in contemplation of death within the meaning of this title.

The first question certified is whether the sentence italicized above is constitutional. We contend that it is valid as a necessary and proper exercise of the power of Congress to lay and collect taxes.

Article I, Section 8, of the Constitution contains, among others, the following provisions (1st and 18th clauses):

> SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

In determining whether the provision of Section 302 (c) of the Revenue Act of 1926 here in question is valid as an exercise of the power granted to Congress, it is important to consider the reasons which led to its inclusion as a part of the Federal estate tax law. Its history plainly shows that the provision under consideration was adopted by Congress

as a necessary means of preventing evasion of the estate tax and after all other efforts to solve the problem had failed.

The present estate-tax law originated in Title II of the Revenue Act of 1916, c. 463, 39 Stat. 796. Section 202 (b) of that Act included in the value of the gross estate of the decedent transfers made in contemplation of death, and provided:

> Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *

This rebuttable presumption, establishing a rule of evidence relative to transfers made within two years of death, was reenacted in Section 402 (c) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, in Section 402 (c) of the Revenue Act of 1921, c. 136, 42 Stat. 227, and in Section 302 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253 (U. S. C., Title 26, Sec. 1094). But several years' experience in the administration of the estate tax law proved that this rebuttable presumption was insufficient to prevent evasions of the estate tax on a large scale.

The difficulty of determining whether a particular transfer was or was not made in contemplation of death is apparent. The question depends largely on the intent of the donor. *United States* v. *Wells*,

mind is almost always a matter of difficulty, and (283 U. S. 102, 117. Proving a person's state of this is especially true when the person is dead. Furthermore, the motives which prompt persons to make gifts are exceedingly complex, and a man may easily lead himself to believe that he makes a gift solely for some purpose to be served during his lifetime, although the fact is that his motive is mixed and that he would not have made it had there been no estate tax in force. If the donor himself can not clearly analyze the motives which actuate his gift, the difficulties which stand in the way of the tax collector when he tries to prove the donor's motive after his death are obvious. Whatever proof exists is almost invariably in the control of the decedent's representatives. If a person sets out to evade the tax, he is very likely to camouflage the motive for making the gift, and it is extremely difficult to show that his declarations are not sincere, particularly as he is not alive and subject to cross-examination. Consequently the Government usually finds it impossible to disprove a claim that a gift was not made in contemplation of death.[1]

[1] The difficulties are clearly illustrated by the fact that up to the time of the committee report on the provision here in question, the Government failed to establish that the transfer in question was made in contemplation of death in every reported case on the subject. See *Polk* v. *Miles*, 268 Fed. 175 (Md.); *Gaither* v. *Miles*, 268 Fed. 692 (Md.); *Vaughan* v. *Riordan*, 280 Fed. 742 (W. D. N. Y.); *Meyer* v. *United States*, 60 C. Cls. 474; *Rea* v. *Heiner*, 6 F. (2d) 389 (W. D. Pa.); *Fidelity & Columbia Trust Co.* v. *Lucas*, 7 F. (2d) 146 (W. D. Ky.); *Appeal of Richardson*, 1 B. T. A. 1196;

To prevent such evasions, Congress in 1924 adopted the gift tax (Secs. 319–324 of the Revenue Act of 1924; U. S. C., Title 26; Secs. 1131–1136), the constitutional validity of which was upheld by this Court in *Bromley* v. *McCaughn*, 280 U. S. 124. The reports of the Committees and the debates in Congress show clearly that the intention was not that the gift tax in itself would produce a large amount of revenue but that it would supplement the estate tax and make the latter effective. It was a step taken by Congress as a necessary and proper incident to the exercise of its constitutional power to levy a tax on testamentary transfers.[2]

Appeal of McDonald, 2 B. T. A. 1295; *Appeal of Hillenmeyer*, 2 B. T. A. 1322; *Appeal of Starck*, 3 B. T. A. 514. The Government has continued to be almost uniformly unsuccessful whenever the claim has been disputed.

[2] House Report No. 179, 68th Congress, 1st Sess., p. 75; House Report No. 1, 69th Congress, 1st Sess., pp. 15, 39; Senate Report No. 52, 69th Congress, 1st Sess., p. 9; *idem*, Part 2, p. 10; Congressional Record, Vol. 65, Part 3, pp. 3119, 3120, 3122; Part 4, pp. 3371, 3372, 3373; Part 8, pp. 8094, 8095, 8096.

Further evidence that the gift tax was intended merely to supplement the estate tax is found in the facts that it was coupled with the estate tax under the same title in the Act of 1924 (Title III); that the rates were the same as in the case of testamentary transfers (Secs. 301 (a) and 319); that the primary exemption of $50,000 was the same (Secs. 303 (a) (4) and 321 (a) (1)); and that in the Revenue Act of 1926, when the estate tax rates were reduced and the reduction was made retroactively effective (Sec. 301), a corresponding change was made in the rates applicable to the gift tax (Sec. 324). Adequate provision was also made for crediting the gift tax against the estate tax where the amount of the gift

But the gift tax proved to be exceedingly difficult to administer and enforce; it resulted in inequalities, the revenue which it produced was small, and its provisions were easily evaded. Senate Report No. 52, 69th Congress, 1st Sess., p. 9. For these reasons it was repealed by Section 324 of the Revenue Act of 1926. As a substitute for the gift tax and the rebuttable presumption as to transfers made within two years of death, Congress enacted the provision under consideration, which in substance taxes the excess of transfers aggregating more than $5,000 to any one person, made without consideration, after the passage of the statute and within two years of death, without proof that they were made in contemplation of death.

It is obvious that no estate tax can be effective without some means for taxing such transfers *inter vivos* as are made to evade the tax imposed at death. Fourteen of the States had found it necessary to adopt similar safeguards for their succession taxes (see Appendix B, pp. 36–38 *infra*, for a history of State legislation); and it can not be said that there was "no basis for this widespread conviction." See *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 205; *Silz* v. *Hesterberg*, 211 U. S. 31, 40.

Congress had tried other means of safeguarding the revenue and believed that the measure here in-

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was later required to be included in the decedent's gross estate (Sec. 322, Revenue Act of 1924; Sec. 404, Revenue Act of 1928, c. 852, 45 Stat. 791 (U. S. C., Sup. V, Title 26, Sec. 1134)).

volved was the only way to prevent evasion. This is shown by the report of the Committee on Ways and Means of the House of Representatives recommending the proposed change. That Committee in its report said (House Report No. 1, 69th Cong., 1st Sess., p. 15):

> Under all the prior revenue acts, a gift or transfer of property by trust or otherwise without a fair consideration and within two years prior to the decedent's death is, unless shown to the contrary, deemed to be made in contemplation of death, and the amount of the gift or transfer is included in the gross estate of the decedent. *The presumption, however, is rebuttable and has proved very ineffective in practical administration. The difficulty of enforcement will be even more serious in view of the repeal of the gift tax.* For this reason, subdivision (c) has been amended so that all such transfers made within two years of the decedent's death without a fair consideration will be included in the gross estate regardless of whether or not they are made in contemplation of death. Experience under the act of 1921 showed that the honest and scrupulous citizen paid the tax, but many less scrupulous found an easy way of evading it. This not only caused great loss in revenue to the Government, but was grossly unfair to those who paid the tax in good faith. *The inclusion of this provision will prevent most of the evasion, and is the only way in which it can be prevented.* (Italics ours.)

One of the fundamental powers granted to Congress by the Constitution is the specific power to lay and collect taxes. Congress is also given power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Legislative history and administrative experience show plainly that after careful study Congress chose the provision now under consideration as a necessary and proper means of carrying into execution its power to lay and collect taxes on estates. Adopting the words of this Court in *Tyler* v. *United States*, 281 U. S. 497, 505:

> The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the [donor]; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end.

II

THE TAXATION OF TRANSFERS MADE WITHIN TWO YEARS OF DEATH IS NOT ARBITRARY OR UNREASONABLE SO AS TO BE WITHIN THE PROHIBITION OF THE FIFTH AMENDMENT

The wording of the provision in question is that of a conclusive presumption that certain transfers are made in contemplation of death. Its effect is to increase the measure of the estate tax by including in the gross estate of the decedent the excess over $5,000 of the aggregate of transfers made to

any one person after the passage of the Act and within two years of death, just as transfers made in contemplation of death are included, although each is a transfer *inter vivos* and not a true testamentary disposition. But the ultimate question is whether, viewed in the light of experience, the shortness of the period intervening between the transfer and death, the ease with which estate taxes are evaded, and the broad powers of taxation granted by the Constitution, the inclusion of such transfers in the measure of the tax is so arbitrary and capricious as to deprive the taxpayer of his property without due process of law.

Considered as creating a conclusive presumption, the statute establishes a rule of substantive law and not a mere rule of evidence. Such statutes have been upheld in many cases. See, for example, *Hawkins* v. *Bleakly*, 243 U. S. 210; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557; *Hawker* v. *New York*, 170 U. S. 189, 195; *Jones* v. *Brim*, 165 U. S. 180, 183; *Street* v. *Farmers' Elevator Co.*, 34 S. D. 523; *Conrad* v. *Smith*, 6 N. D. 337, 342, 343; *State ex rel. London & L. Ind. Co.* v. *District Court*, 139 Minn. 409, 411; *State* v. *Lapointe*, 81 N. H. 227; *Matter of Buchanan*, 184 App. Div. 237; 10 Tex. Law Review, p. 34. Cf. *Mobile, etc., R. R. Co.* v. *Turnipseed*, 219 U. S. 35. which deals with a rebuttable presumption establishing a rule of evidence, as distinguished from a conclusive presumption establishing a rule of substantive law.

The creation of a conclusive presumption, is "after all but an illustration of the power to classify." *Jones* v. *Brim*, 165 U. S. 180, 183, *supra*. The question, then, is whether Congress has exceeded its power by including in the value of the gross estate only certain transfers made after the passage of the statute and within two years of death.

We have already contended that the power to include such transfers in the measure of the gross estate is granted to Congress in Article I, Section 8, of the Constitution, authorizing Congress to lay and collect taxes, and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." There is nothing in the Constitution which forbids the exercise of this power unless it is to be found in the Fifth Amendment. That amendment provides that "no person shall * * * be deprived of life, liberty, or property, without due process of law."

Congress has power to levy a tax upon testamentary transfers as well as upon transfers *inter vivos*. It is plain that the inclusion of transfers of the kind here involved is not forbidden by the Constitution merely because they do not technically pass at the decedent's death as a part of his estate. Thus, it is settled that gifts *inter vivos* made in contemplation of death may be included in the measure of the gross estate, although they are fully executed, are irrevocable and indefeasible. *United States* v. *Wells*, 283 U. S. 102; *Milliken* v.

United States, 283 U. S. 15. The value of property transferred in trust many years before the decedent's death may be included in the measure of the gross estate when the decedent has reserved a power of revocation. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. Property held by the decedent and his wife as tenants by the entirety may be included in the measure of the gross estate. *Tyler* v. *United States*, 281 U. S. 497.

So, the sole constitutional objection to the provision now under consideration must be based upon the proposition that the classification adopted by Congress is so arbitrary and unreasonable as to offend against the general language of the due process clause of the Fifth Amendment. We submit that the classification is a reasonable and proper one, within the power of Congress.

The statute is entirely prospective in operation. It includes no transfers made prior to its enactment, even though the donor's death occurs thereafter. The decedent was fully informed that the value of the transfer would be included in his gross estate should his death occur within two years thereafter. See *Milliken* v. *United States*, 283 U. S. 15, 23–24, *supra*. Cf. *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, *supra*.

It applies only to the excess over $5,000 of transfers to each donee within the period, thus leaving ample room for the ordinary bounty of donors and affecting only those transfers which otherwise would have the effect of substantially reducing the amount of the estate taxable at death.

The statute comes within the principle which this Court has repeatedly recognized, that the means by which a law may be avoided or defeated is a proper basis for classification. *St. John* v. *New York*, 201 U. S. 633; *District of Columbia* v. *Brooke*, 214 U. S. 138, 150; *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 69; *Tyler* v. *United States*, 281 U. S. 497, 505; *Milliken* v. *United States*, 283 U. S. 15, 20, *supra*.

The only objection that can be raised to the classification is that it may include transfers which were made without intent to evade the estate tax. But the inclusion within the tax of some gifts which in fact were not made to evade the estate tax is not an insuperable objection. This Court has frequently upheld statutes that included innocent articles or activities within the proscribed class, because their inclusion was necessary in order effectively to accomplish the purpose to which the law was directed.[3] A provision may be valid as a necessary adjunct to a matter that lies within the legis-

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[3] *Powell* v. *Pennsylvania*, 127 U. S. 678; *Jones* v. *Brim*, 165 U. S. 180; *Hawker* v. *New York*, 170 U. S. 189, 195; *Otis* v. *Parker*, 187 U. S. 606; *Silz* v. *Hesterberg*, 211 U. S. 31; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Hawkins* v. *Bleakly*, 243 U. S. 210; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303; *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498, 500; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 283; *National Prohibition Cases*, 253 U. S. 350, 387–388; *Everard's Breweries* v. *Day*, 265 U. S. 545, 560; *Euclid* v. *Ambler Co.*, 272 U. S. 365, 389; *Lambert* v. *Yellowley*, 272 U. S. 581; cf. *United States* v. *Doremus*, 249 U. S. 86, 94. For the convenience of the Court, abstracts of these cases are set out in Appendix C, *infra*, pp. 39–42.

lative power, even though standing alone its constitutionality might have been subject to doubt. This doctrine has been applied repeatedly in tax cases.[4] And it has been held that it is permissible incidentally to include in the measure of an excise tax property exempt from taxation.[5] If Congress may prohibit the sale of confessedly innocent articles in order to insure the effective prohibition of others (and this Court has held that it may), we submit that Congress may also pass a measure necessary to prevent the evasion of taxes even though it may operate incidentally to tax some transactions which do not fall within the class which is the main subject of the tax.

The principle that equalizing taxation and preventing evasion justifies a classification that may incidentally include innocent objects is peculiarly applicable to the situation that confronted Congress. The circumstances which led to the adoption of the statute demonstrated the necessity of the provision to prevent evasion of the estate tax. By the trial and error method over a period of ten years Congress reached the conclusion that this statute was the only way in which the revenues of the Government could be protected. Congress is the judge of the degree of the necessity which calls

[4] *Milliken* v. *United States*, 283 U. S. 15, 20; *Tyler* v. *United States*, 281 U. S. 497, 505; *Corliss* v. *Bowers*, 281 U. S. 376, 378; *Taft* v. *Bowers*, 278 U. S. 470, 482; cf. *Fawcus Machine Co.* v. *United States*, 282 U. S. 375.

[5] *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Educational Films Corp.* v. *Ward*, 282 U. S. 379.

forth the statute (*Everard's Breweries* v. *Day*, 265 U. S. 545, 559), whether the necessity arises because of the difficulty of proof, the similarity of objects, or because experience has shown that the thing declared by the statute to be true is so often true that the administration of justice will best be served by not permitting it to be questioned in any case.[6]

There is no basis for an objection to the classification adopted by Congress on the ground that

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[6] So-called "conclusive presumptions," such as that involved in the present case, which are in reality rules of substantive law, are found in the common law and have for many years been included in statutes. The effect of such a "presumption" is to regard as a fact that which may not be a fact. Among the so-called "conclusive presumptions" are: A child under seven years of age is unable to form a criminal intent (*Allen* v. *United States*, 150 U. S. 551, 558); a male child under fourteen years of age can not commit the crime of rape, and the related presumption as to the age of consent by a female (see *Holland* v. *State*, 161 Ga. 492); tax deeds are conclusive as to compliance with requirements of tax laws (*Callanan* v. *Hurley*, 93 U. S. 387, 390, 392); a deed registered twenty years or more under a Tennessee statute is registered on lawful authority (*Webb* v. *Den*, 17 How. 576); the imposition of liability on cities for damage by mob violence (*City of Chicago* v. *Sturges*, 222 U. S. 313).

The difficulties of proof justified imposing liability upon the initial carrier for loss or damage to goods shipped on a through bill of lading *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186.

The so-called "conclusive presumptions" are frequently met in Federal tax laws. Under Section 31 (b) of the Revenue Act of 1916 added by Section 1211 of the Revenue Act of 1917, c. 63, 40 Stat. 300, and Section 201 (b), (d), and (e) of the Revenue Act of 1918, and the corresponding sections of the subsequent Acts, dividends are conclusively presumed to have

the operation of the act is limited to transfers made within two years of death. Such a result is inherent in any classification. It might as well be said that statutes classifying persons twenty-one years old as eligible to vote or competent to contract are invalid for the reason that a person one day under twenty-one is just as competent as a person one day older.[7] The two-year line drawn by Congress is, we submit, justified by "the natural and reasonable inference which may be drawn from the fact that but a short period intervenes between the transfer and death." *United States* v. *Wells*, 283 U. S. 102, 117, *supra*.

The classification adopted by Congress is permissible because it has a "reasonable relation" to

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been paid out of certain specified profits. *Douglas* v. *Edwards*, 298 Fed. 229 (C. C. A. 2d), reversed on other grounds, 269 U. S. 204; *Harder* v. *Irwin*, 285 Fed. 402 (N. D. N. Y.); *Leland* v. *Commissioner*, 50 F. (2d) 523 (C. C. A. 1st), certiorari denied, 284 U. S. xv, in which a reconsideration of the petition for certiorari on the ground that the same question was involved as in the instant case was denied by this Court November 23, 1931; cf. *Mason* v. *Routzahn*, 8 F. (2d) 56 (N. D. Ohio), reversed, 13 F. (2d) 702 (C. C. A. 6th). The Circuit Court of Appeals for the First Circuit has invoked the presumption that a woman of any age is capable of bearing a child in determining the taxability of a contingent remainder. *Farrington* v. *Commissioner*, 30 F. (2d) 915. See also R. S. 3207, as amended by Section 1127, Revenue Act of 1926 (U. S. C., Sup. V, Title 26, Sec. 136), which establishes a conclusive presumption as to the validity of assessment in suits in equity by prior lienors.

[7] Other illustrations appear in footnote 6, *supra*. And see *King* v. *Mullins*, 171 U. S. 404; *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61.

the end sought to be attained, i. e., the collection of the estate tax. Its basis need not be—though in this instance it is—deducible from the nature of the things classified; it is enough "if the classification is reasonably founded in 'the purposes and policies of taxation.'" *Watson* v. *State Comptroller,* 254 U. S. 122, 124; *Stebbins* v. *Riley,* 268 U. S. 137, 143.

This Court has held that it was not the intention of the framers of the Constitution and of the first ten amendments that the power expressly granted to Congress to lay and collect taxes was to be made ineffective by the prohibition of the Fifth Amendment against taking property without due process of law. *Brushaber* v. *Union Pacific Railroad,* 240 U. S. 1. The Court also suggested that an Act might be so arbitrary as to constrain the conclusion that it was not an exertion of the taxing power at all, but a confiscation of property, and therefore violated the Fifth Amendment. The suggestion has found application in the cases of *Nichols* v. *Coolidge,* 274 U. S. 531, and *Untermyer* v. *Anderson,* 276 U. S. 440, in each of which the Act in question was held unconstitutional because its retroactive application to transactions completed before the passage of the taxing statute was regarded as unreasonable. We have found no other decision of this Court in which a revenue act has been held to offend against the due process clause of the Fifth Amendment. The question involved in this case is not one of retroactivity, but of classification. An unreasonable application of a retroactive tax law is

a taking of property without due process of law, because the essence of the constitutional requirement of due process prevents an *ex post facto* imposition of a burden upon a right fully exercised. But it is submitted that in no case involving the power of taxation has this Court held a *classification* unconstitutional under the Fifth Amendment.

We respectfully submit that the statutory classification is a reasonable one. The presumption is in favor of the constitutional validity of a statute. It should not be set aside unless it clearly operates to deprive the taxpayer of due process of law. See *Hylton* v. *United States,* 3 Dall. 171, 174; *Fletcher* v. *Peck,* 6 Cranch 87, 128; *Ogden v. Saunders,* 12 Wheat. 213, 270, *Legal Tender Cases,* 12 Wall. 457, 531; *Sinking-Fund Cases,* 99 U. S 700, 718, *Trade-Mark Cases,* 100 U. S. 82, 96; *Mugler* v. *Kansas,* 123 U. S. 623, 661; *Nicol* v. *Ames,* 173 U. S. 509, 514–515; *Buttfield* v. *Stranahan,* 192 U. S. 470, 492; *Graves* v. *Minnesota,* 272 U. S. 425, 428; *Whitney* v. *California,* 274 U. S. 357, 371. In view of the fact that Congress has after long experience found the measure necessary to prevent evasions and inequalities and that the legislatures of fourteen States have enacted similar measures, should the courts say that it is bad "beyond a reasonable doubt" and must be overthrown? There must be some relatively short period of time prior to death which can be justified as a basis for declaring, as a substantive rule of law, that transfers occurring within its limits were made in contemplation of death. None of the courts which have held the

provision arbitrary and unreasonable has even attempted to demonstrate that the two-year period does not bear a necessary and reasonable relationship to contemplation of death.

III

THE PRESENT CASE IS NOT CONTROLLED BY SCHLESINGER v. WISCONSIN, 270 U. S. 230.

The District Court based its conclusion (48 F. (2d) 1058) that the statute in question was unconstitutional upon the decision of this Court in *Schlesinger* v. *Wisconsin,* 270 U. S. 230.[8]

This Court there held that a six-year provision in the Wisconsin inheritance-tax law violated the Fourteenth Amendment. Although this Court did not then and has not ordinarily found it necessary, in considering State statutes, to differentiate between the due process and the equal protection clauses of the Fourteenth Amendment, the difference between the equal protection clause in the Fourteenth Amendment and the due process clause in the Fifth is indicated in *LaBelle Iron Works* v. *United States,* 256 U. S. 377, where the Court said (p. 392):

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[8] The *Schlesinger* case was also the basis of the decisions of the courts below in *Handy* v. *Delaware Trust Co.*, 51 F. (2d) 867 (D. Del.), No. 546, on certificate from the Circuit Court of Appeals for the Third Circuit; *White* v. *Hall*, 48 F. (2d) 1060 (D. Mass.), 53 F. (2d) 210 (C. C. A. 1st), No. 636, on petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit; and *Anderson* v. *Guinzburg*, 51 F. (2d) 592 (S. D. N. Y.), — F. (2d) —— (C. C. A. 2d), No. 689, on petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

> The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is the territorial uniformity required by Art. I, § 8. * * * The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the States under the equal protection clause, much less of Congress under the more general requirement of due process of law in taxation.

See also *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 161.

Furthermore, the statute under consideration in the *Schlesinger case* and the inheritance tax law of which it was a part differ in several material respects from the Federal estate tax law under consideration here. The Wisconsin law by means of a conclusive presumption included all transfers of a material part of the estate made within six years of death, and the extremely long period embraced in the Wisconsin statute undoubtedly influenced the Court in reaching its conclusion that the statute was arbitrary. But here the period is only two years; the reasonableness of the inference increases as the time interval diminishes, and when the "short period" of two years is reached the inference becomes natural and reasonable. *United States* v. *Wells*, *supra*, 283 U. S. 102, 117. In the *Wells* case, in discussing the two-year rebuttable presumption which was the predecessor of the

present statute, this Court recognised "the natural and reasonable inference which may be drawn from the fact that but a short period intervenes between the transfer and death." There is an adequate basis for including such transfers within the statute and excluding others made at more remote periods. *Klein* v. *Board of Supervisors*, 282 U. S. 19, 23.

The *Schlesinger case*, 270 U. S. 230, 240, obviously was not intended to repudiate the principle that Congress may include within the scope of its legislative acts all that is reasonably necessary to carry its powers into execution, for since the decision in that case the principle has been recognized several times by this Court. *Milliken* v. *United States*, 283 U. S. 15, 20; *Tyler* v. *United States*, 281 U. S. 497, 505; *Taft* v. *Bowers*, 278 U. S. 470, 482; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388, 389.

These cases may be reconciled with the *Schlesinger case* and the later cases of *Baldwin* v. *Missouri*, 281 U. S. 586, 593–594, and *Hoeper* v. *Tax Commission*, No. 17, October Term, 1931, decided November 30, 1931, because the three cases last named fall completely outside the penumbra which embraces the situations that permit the occasional inclusion of innocent objects when reasonably necessary to the accomplishment of a proper legislative end. In *Baldwin* v. *Missouri*, the court obviously was of the opinion (p. 594) that it was only in exceptional cases that personal tangibles could escape taxation; and in the *Hoeper case* the degree

of the necessity for using the wife's income as a part of the measure of the taxable income of the husband was extremely remote if not entirely absent. In other words, the degree of necessity existing in the *Schlesinger, Baldwin,* and *Hoeper cases* was so slight as to make the legislative action unreasonable, while in the present case the necessities have been recognized and other measures designed to meet them have been approved by this Court.

Another difference which may distinguish the two cases is that the Wisconsin statute levied an excise tax upon the privilege of receiving property by succession, the tax falling upon the donee, who was made personally liable therefor, and remaining a lien upon the property transferred until it was paid (*Schlesinger case,* p. 237), while the Federal estate tax is an excise upon the right to transmit, and attaches to the estate before distribution. *New York Trust Co.* v. *Eisner,* 256 U. S. 345. The Wisconsin law imposed a direct inheritance tax upon an individual whose right to receive a gift did not depend upon the permission of the State for the purpose of facilitating the collection of a tax from testamentary transferees whose right to receive was given by statute. Under the Federal estate tax law the tax is upon the right to transmit and falls upon the estate before distribution. The value of transfers made within two years of death is included as a part of the yardstick with which to measure the tax to be paid out of the estate of the person who himself exercised the privilege of transfer.

It should also be pointed out that this Court's opinion in the *Schlesinger case* may have been based in part at least on a misconception. In its opinion this Court declared (p. 240) that, under the Wisconsin statute, gifts within six years of death—

> are subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character.

That such transfers may be so taxed, whether as gifts *inter vivos* or as transfers made in contemplation of death, is now settled by the *Bromley* and *Milliken cases.*

We submit that the foregoing material differences in the statutes involved and their application distinguish this from the *Schlesinger case.*

IV

THE SECOND SENTENCE OF SECTION 302 (c) OF THE REVENUE ACT OF 1926 IS NOT REPUGNANT TO SECTIONS 1111, 1113 (a), 1117, AND 1122 (c) OF THE SAME ACT

The second question certified refers to the taxpayer's contention in the courts below that since the above sections set up a complete system of corrective justice (*Cheatham* v. *United States,* 92 U. S. 85, 88), the second sentence of Section 302 (c) is repugnant to them because it deprives the taxpayers of the right to prove the facts. A reference to the sections indicated discloses that the taxpayer's right to recover is limited to taxes erroneously or illegally assessed and collected. If

the second sentence of Section 302 (c) is constitutional, the taxes collected under it would be taxes legally assessed and collected. It would, therefore, not be in conflict with or repugnant to the sections of the statute above referred to.

CONCLUSION

The statute is a necessary means adopted to protect the revenue of the Government and as incidental to and in aid of a constitutional power to tax. The classification it sets up is not arbitrary. Both questions should be answered in the negative.

Respectfully submitted.

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Revenue Act of 1926, c. 27, 44 Stat. 9, 70, 115, 116, 119, 1921:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
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> * * * * * *
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> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death,

except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

* * * * *

(U. S. C., Sup. V, Title 26, Sec. 1094.)

SEC. 1111. Section 3220 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3220. Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926 the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed

or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section." (U. S. C., Sup. V, Title 26, Sec. 149.)

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from

the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

(U. S. C., Sup. V, Title 26, Sec. 156.)

SEC. 1117. Section 177 of the Judicial Code, as amended, is amended to read as follows:

"SEC. 177. (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

"(b) In any judgment of any court rendered after the enactment of the Revenue Act of 1926 (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any internal-revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or for any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws, interest shall be allowed at the rate of 6 per centum per annum upon the amount of such tax, penalty, or sum, from the date of the payment or collection thereof to the date of entry of such judgment or, if such judgment is reviewed by an appellate court, to the date of entry of final judgment." (U. S. C., Sup. V, Title 28, Sec. 284.)

SEC. 1122. (c) The paragraph added by section 1310 of the Revenue Act of 1921 at the end of paragraph Twentieth of section 24 of the Judicial Code, relating to the jurisdiction of district courts, as amended, is reenacted without change, as follows:

"Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced." (U. S. C., Sup. V, Title 28, Sec. 41 (20).)

APPENDIX B

CONCLUSIVE PRESUMPTION PROVISIONS IN STATE INHERITANCE TAX LAWS ADOPTED PRIOR TO 1926

Arizona.—Six-year presumption; Laws 1922, c. 26, sec. 1 (3); Act upheld generally *In re Hubbs,* 31 Ariz. 252, but no mention made of conclusive presumption.

Arkansas.—Three-year presumption covering transfers valued at $500 or over; Acts 1923, Act 438, sec. 1 (3); repealed, Laws 1929, Act 106, sec. 1; rebuttable presumption not substituted.

Colorado.—One-year presumption; Laws 1921, c. 144, sec. 2 (c); two-year rebuttable presumption substituted; Laws 1927, c. 114, sec. 2 (2) (c).

Indiana.—Two-year presumption; laws 1917, c. 118, sec. 1 (4); two-year rebuttable presumption substituted; Laws 1929, c. 65, sec. 1.

Kansas.—One-year conclusive presumption originally adopted; Laws 1909, c. 248, sec. 1; repealed; Laws 1913, c. 330; reenacted; Laws 1915, c. 357, sec. 1; one-year period changed to 90 days; Laws 1919, c. 305, sec. 1. The constitutionality of the 1909 Act was upheld in *State* v. *Cline,* 91 Kan. 416, but the conclusive presumption clause was not mentioned.

Kentucky.—Laws 1924, c. 111, sec. 1 (2); three-year period. Held unconstitutional on authority of *Schlesinger case* in *State Tax Commission* v. *Robinson's Executor,* 234 Ky. 415.

Mississippi.—Two-year presumption; Laws 1924, c. 134, sec. 5. Code of 1930, sec. 5069 (f).

Missouri.—Two-year presumption; Laws 1917, p. 115 (Revised Statutes 1919, sec. 558; Revised Statutes 1929, sec. 570); not repealed. Constitutionality of Act upheld in *State ex rel. McClintock* v. *Gwinott,* 275 Mo. 298, but conclusive presumption clause not mentioned.

North Carolina.—Five-year *prima facie* presumption as to gifts amounting to over 5 per cent of estate; Laws 1919, c. 90, sec. 6; repealed, Laws 1925, c. 101, sec. 903, and gifts amounting to over 3 per cent of estate made within three years of death were included without designating them as being in contemplation of death; Laws 1925, c. 101, sec. 6 (6); repealed, Laws 1927, c. 80, sec. 463, and three-year *prima facie* presumption as to gifts in excess of 3 per cent of estate substituted; Laws 1927, c. 80, sec. 1 (3), now sec. 7880 (1), Code 1927 Ann. and 1929 Supp.

North Dakota.—Six-year presumption; Laws 1919, c. 225, sec. 1 (3); (Supplement to Compiled Laws, sec. 2346 b 1 (3)); two-year rebuttable presumption substituted; Laws 1927, c. 267, sec. 2 (4) (c).

South Carolina.—Five-year presumption as to transfers between parties related by blood or marriage; Laws 1922, Act 478, p. 800, sec. 1 (c); (32 Stat. Large 800); reenacted; Laws 1924, Act 538, p. 902, sec. 1 (c); reenacted; Laws 1925; Act 143, p. 201, sec. 1 (c); (34 Stat. Large 201).

Tennessee.—Two-year presumption; Acts 1919, c. 46, p. 118, sec. 1 (4); *id.* Baldwin's cumulative Code Supp. (1920), sec. 724 (a) 1 (4); *id.* Shan-

non's Ann. Code Supp. (1926), sec. 756 (a) 1 (4); two-year rebuttable presumption substituted; Acts 1929, Extra Sess., c. 29, sec. 1 (2) (c); *id.* Code of 1932, sec. 1260 (2) (c).

West Virginia.—Three-year presumption covering transfers of more than $500; Laws 1921, Extra Sess., c. 3, sec. 1 (c); *id.* Barnes Ann. Code, 1923, c. 33, sec. 1 (c); *id.* Official Code, 1931, c. 11, Art. 11, sec. 1 (c).

Wisconsin.—Six-year presumption; Laws 1913, c. 643, sec. 1; same c. 72, sec. 72.01 (3) Statutes 1929. Two-year *prima facie* presumption substituted; Laws 1929, c. 462, sec. 1.

Decisions: Conclusive presumption upheld in *Estate of Ebeling,* 169 Wis. 432; *Estate of Schlesinger,* 184 Wis. 1; *Will of Uihlein,* 187 Wis. 101. Held unconstitutional: *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Estate of Schlesinger,* 190 Wis. 283 (following decision of Sup. Ct. U. S.).

APPENDIX C

CASES IN WHICH THIS COURT HAS UPHELD THE VALIDITY OF STATUTES AFFECTING INNOCENT OBJECTS IN ORDER TO PREVENT EVASION OR AVOIDANCE

Powell v. *Pennsylvania*, 127 U. S. 678: A Pennsylvania statute prohibiting the sale of all wholly oleaginous substitutes for butter and cheese was sustained. The defendant's offer to prove that his particular product was wholesome and nutritious was rejected on the ground that the legislature's determination that the entire suppression of such articles was necessary was conclusive.

Jones v. *Brim*, 165 U. S. 180: A Utah statute provided that a person driving herds of cattle over highways constructed on a hillside would be conclusively presumed to have been negligent where damage resulted to the highway. It was sustained on the basis of experience and of difficulty of proof.

Hawker v. *New York*, 170 U. S. 189, 195: A statute of the State of New York made a person's conviction of a felony conclusive of his lack of good moral character, which was one of the prerequisites of the right to practice medicine. It was sustained on the ground of experience.

Otis v. *Parker*, 187 U. S. 606: A California constitutional provision prohibited all sales of stock on margin. Its validity was contested on the ground that its purpose and the State's proper object was to prevent gambling, but that in prohibit-

ing all sales on margin the provision necessarily prohibited some sales which were not gambling transactions. The provision was held constitutional, despite its prohibition of an entire class of transactions, not in themselves necessarily objectionable, because the legislature reasonably believed the measure necessary.

Silz v. *Hesterberg*, 211 U. S. 31: In order to protect its game, New York enacted a law prohibiting, during the closed season, the possession of certain types of game from whatever source derived. The State's power to punish the defendant who acquired abroad and imported into New York game of the class listed was upheld despite the defendant's contention that the law prohibited a transaction which had no relation to the protection of domestic game.

Purity Extract Co. v. *Lynch*, 226 U. S. 192: The statute, aimed at intoxicants, prohibited the sale of all malt liquor. The plaintiff manufactured a product composed of 5.73 per cent malt and no alcohol, and contended that the statute deprived him of property without due process of law, because his product was not intoxicating. This Court held the statute constitutional, saying (p. 201):

> It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government.

Hawkins v. *Bleakly*, 243 U. S. 210: A provision of the elective Workmen's Compensation Act of the State of Iowa was upheld which provided that

if an employee filed an affidavit that his employer or agent had requested him to elect to reject the act it would be conclusively presumed that the employee had been unduly influenced. The Court upheld it because of the improbability of the presumed fact being untrue, and said (p. 214):

> The lawmaker no doubt entertained the view that the act was more beneficial to employees than the common law rules of employer's liability, and that it was highly improbable an employee would reject the new arrangement of his own free will. The provision is a permissible regulation in aid of the general scheme of the act.

Hebe Co. v. *Shaw,* 248 U. S. 297: A statute of Ohio forbade the sale of condensed milk unless made from unadulterated milk from which the cream had not been removed. The appellant's product consisted of condensed skimmed milk combined with cocoanut oil; it was wholesome and nutritious. It was held that the statute could be applied to forbid the sale of this product.

Pierce Oil Corp. v. *City of Hope,* 248 U. S. 498: A city ordinance forbade the storing of gasoline, petroleum, etc., within three hundred feet of any dwelling, beyond certain small quantities specified. The ordinance was sustained against an attack based upon the Fourteenth Amendment. To the contention that its tanks in no way endangered any buildings, this Court said (p. 500):

> If it were true that the necessarily general form of the law embraced some innocent objects, that of itself would not be enough to invalidate it or to remove such an object from its grasp.

Jacob Ruppert v. *Caffey*, 251 U. S. 264: This Court upheld the war prohibition provisions of the National Prohibition Act, which forbade the sale of beverages containing one-half of one per cent or more of alcohol by volume. This Court said (p. 282):

> * * * it is clear that this provision of the Volstead Act is valid, and has rendered immaterial the question whether plaintiff's beer is intoxicating.

The same result was reached when the similar provision of Title II of the National Prohibition Act was before this Court. *National Prohibition Cases*, 253 U. S. 350, 387–388.

Everard's Breweries v. *Day*, 265 U. S. 545: An Act of Congress prohibited physicians from prescribing intoxicating malt liquors for medicinal purposes. This Act was held constitutional against the contention that malt liquors had valuable medicinal properties and that the prohibition of their sale for medicinal purposes bore no reasonable relation to the prohibition of their sale for beverage purposes.

A similar result was reached in *Lambert* v. *Yellowley*, 272 U. S. 581, where a statute limiting the amount of spiritous liquor to be prescribed by physicians was upheld.

Euclid v. *Ambler Co.*, 272 U. S. 365: A general zoning ordinance excluded all industrial establishments from a certain territory in a city. It was held that the ordinance was valid although it operated to exclude some industries which were

neither offensive or dangerous. This Court said (pp. 388–389):

> The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation.

U. S. GOVERNMENT PRINTING OFFICE: 1932

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Supreme
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

NO. 514.

D. B. HEINER, Collector of Internal Revenue, 23rd District of Pennsylvania, Pittsburgh, Pennsylvania,

v.

JOHN H. DONNAN, SIDNEY B. DONNAN, ALVAN E. DONNAN and DOROTHY D. WHITWORTH, Executors and Trustees of the Estate of JOHN W. DONNAN, Deceased, of Washington, Pennsylvania.

BRIEF FOR EXECUTORS.

On Certificate From the United States Circuit Court of Appeals for the Third Circuit.

WILLIAM G. HEINER,
Attorney for Executors.

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Pittsburgh, Pa.

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IN THE

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BRIEF FOR EXECUTORS.

I.

OPINIONS OF THE COURT BELOW.

The opinion of the District Court on the statutory demurrer is reported in 48 Fed. (2) 1058. The final opinion of the District Court is not officially reported but may be found at #1515 Prentice-Hall 1931 Federal Tax Service. No opinion was handed down by the Circuit Court of Appeals.

II.

JURISDICTION.

The certificate of the Circuit Court of Appeals was filed in the office of the clerk of this Court on November 11, 1931. The jurisdiction of this Court rests upon Section 239 of the Judicial Act, as amended by the Act of February 13, 1925.

III.

QUESTIONS CERTIFIED.

1. Does the second sentence of Section 302(c) of the Revenue Act of 1926 violate the due process clause of the Fifth Amendment to the Constitution of the United States?

2. If the answer to the first question be in the negative, is the second sentence of Section 302(c) of the Revenue Act of 1926 void because repugnant to Sections 1111, 1113 (a), 1117 and 1122 (c) of the same act?

IV.

LAWS INVOLVED.

The laws, constitutional and statutory, are set forth in the appendix, *infra*.

V.

ARGUMENT.

Summary.

The second sentence of Section 302(c), Revenue Act of 1926, (appendix), provides that a gift (in excess of $5,000) made within two years of death is conclusively presumed to have been made in contemplation of death. Former revenue acts (without the $5,000 exemption) provided for only a rebuttal presumption under such circumstances.

It is beyond the power of the legislature to prohibit proof of the truth, except, possibly, in the case of a national emergency. This is a republican government, founded upon fact, not fiction. A complete and irrevocable gift *inter vivos* is taxable for estate taxes only in the event that it is, in fact, made in contemplation

of death. Classification, if reasonable, is proper, but time, itself, is no reasonable basis for classification. Mentality is, and of right ought to be, free and never fixed by legislative fiat. Classify physical objects but never mentality.

This sentence deprives the taxpayer of his day in court, is arbitrary and capricious, and therefore deprives him of property without due process of law. It is also void for repugnancy, in that it deprives the taxpayer of his right to prove the truth, while later and paramount sections in the same act, which have been characterized by this Court as a complete system of corrective justice, afford him this right.

Question 1. Does the Second Sentence of Section 302(c) of the Revenue Act of 1926 Violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

The executors contend that the tax is not due unless and only in the event that death was, in fact, contemplated. The first sentence of Section 302(c) provides that the property of a decedent transferred without consideration "at any time" is taxable if made in contemplation of death. The first sentence merely puts the burden of proof on the taxpayer to show by the fair preponderance of the evidence that the decedent did not contemplate death. According to the statement of facts of the Circuit Court of Appeals, there is no tax due under the first sentence, because death was not contemplated (R. 2). The third sentence of this section has no application to this case, because it applies to transfers "prior to the enactment of this Act" (Feb. 26, 1926); whereas the transfers here involved were in 1927, subsequent to the enactment of the 1926 Act (R. 1). The executors contend that neither the first nor third sentences establish even a rebuttable presumption

against them, and that their only burden is, as plaintiffs in this cause, to prove the truth.

The collector contends that it is the second sentence of this section under which the transfer and advancement are taxable, irrespective of whether or not they were made in contemplation of death. He contends that, since both the transfer and advancement were made without consideration and within two years of death, they must necessarily be taxable under the second sentence of this section, because this sentence provides that such gifts shall be "deemed and held" to have been made in contemplation of death, and that, no matter whether, in fact, the gifts were not made in contemplation of death, the meaning of the second sentence is clear and the gifts must be taxed. He insists that the words "deemed and held" constitute a conclusive presumption of fact and that the executors are not entitled to introduce evidence of facts tending to rebut this presumption.

The executors concede that the words "deemed and held" in the second sentence constitute a conclusive presumption of fact. They contend, however, that this sentence deprives them of their day in court, is arbitrary and capricious, depriving them of the equal protection of the laws, and therefore violates the due process clause of the Fifth Amendment.

Prior to the Revenue Act of 1926, transfers without consideration, made within two years of death, were presumed to have been made in contemplation of death "unless shown to the contrary". This was a rebuttable presumption under the estate tax provisions. It appeared in every revenue act from 1916 to 1924, inclusive (appendix).

The argument of the executors that the conclusive presumption violates the due process clause of the Fifth

Amendment will be set forth under two points: (1) that it deprives them of their day in court and (2) that it is arbitrary and capricious, depriving them of the equal protection of the laws.

Point (1) Day in Court.

The case most nearly like the one at bar, and upon which the executors chiefly rely, is that of *Schlesinger v. Wisconsin,* 270 U. S. 230. In that case it appeared that a statute of the State of Wisconsin (Wis. Stats. 1919, §1087-1, c. 64 ff) provided that every transfer of a material portion of a grantor's estate without adequate valuable consideration, made within "six years" prior to the death of the grantor, "shall be construed to have been made in contemplation of death within the meaning of this section". The executors of the Schlesinger Estate contended that this provision of the Wisconsin statute violated the "due process of law" clause of the Fourteenth Amendment. In holding the statute unconstitutional, in a six to three decision, this Court, through Mr. Justice McReynolds, said (p. 239):

> "The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a gradual inheritance tax upon them without regard to the *actual intent.* The presumption is declared to be conclusive and cannot be overcome by evidence. *It is no mere prima facie presumption of fact.*
>
> "* * * Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made *without regard to actualities,* while *like* gifts at other times are not thus treated. There is no adequate basis for this distinction. * * *
>
> "The presumption and consequent taxation are

defended upon the theory that, exercising judgment and discretion, the Legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, A. may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against B. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever." (Italics supplied)

Exactly eight months later (November 1, 1926) this Court in the case of *Uihlein et al. v. Wisconsin,* 273 U. S. 642, in a *per curiam* decision, again declared the same Wisconsin statute to be unconstitutional "on the authority of *Schlesinger v. Wisconsin*".

The Supreme Court of the State of Kentucky, in the case of *State Tax Commission v. Robinson's Ex'r.*, 28 S. W. (2) 491, was called upon to pass upon the constitutionality of a Kentucky statute (Ky. St. §4281 a-1, subsec. 2) which provided that every gift of property made within "three years" prior to a donor's death shall be "construed to have been made in contemplation of death". The Supreme Court of Kentucky held this statute unconstitutional on the authority of the Schlesinger case.

The decision of the District Court below holding the statute unconstitutional is now supported by the decisions of six other tribunals. The second sentence of Section 302(c) of the Revenue Act of 1926 has been declared unconstitutional by three other district courts, two circuit courts of appeal and the Board of Tax Appeals in the cases of *Hall v. White,* 48 Fed. (2) 1060, affirmed by the United States Circuit Court of Appeals

for the First Circuit, 53 Fed. (2) 210; *Guinzburg v. Anderson,* 51 Fed. (2) 592, affirmed on December 7, 1931, by the United States Circuit Court of Appeals for the Second Circuit, #2199 Prentice-Hall 1931 Federal Tax Service (not yet officially reported); *Delaware Trust Co. v. Handy,* 51 Fed. (2) 867, 53 Fed. (2) 1042, (on certificate to this Court from the Circuit Court of Appeals below, #546 October Term, 1931), and *Lincoln v. Commissioner,* 24 B. T. A. 334; all on the authority of *Schlesinger v. Wisconsin.*

It would seem, then, that this phase of the question had been settled by the Schlesinger case. However, in support of an affirmative answer to this question, we now cite in this brief cases having to do generally with conclusive and rebuttable presumptions. An examination of these cases, we believe, will clearly show that, whenever the question was squarely raised and decided, no court has ever held valid a conclusive presumption of fact, but that, on the contrary, every conclusive presumption of fact has been declared invalid, with the possible exception of one case having to do with an emergency war measure.

Taking up, first, those cases in which the courts have declared invalid conclusive presumptions of fact, we find that in the case of *United States v. Klein,* 80 U. S. 128, this Court was called upon to consider the constitutionality of an Act of Congress, July 12, 1870, 16 Stat. at L. 235, which provided that whenever any pardon shall recite that a person took part in the late rebellion and was guilty of disloyalty to the United States, and the pardon is accepted without disclaimer of guilt, such pardon and the acceptance thereof "shall be taken and deemed * * * conclusive evidence that such person did take part in and give aid and comfort to the late rebellion * * *". In holding this statute

unconstitutional, this Court, speaking through Mr. Chief Justice Chase, said (p. 147):

> "We think that Congress has inadvertently passed the limit which separates the legislative from the judicial power."

In the case of *Manley v. Georgia,* 279 U. S. 1, this Court was called upon to pass upon the constitutionality of a statute of the State of Georgia (Georgia Laws 1919, Sect. 28, Art. XX), in which it was provided that every insolvency of a bank shall be "deemed" fraudulent, that the president and directors shall be severely punished by imprisonment, but that the defendant in such a case "may repel the presumption of fraud" by showing that the affairs of the bank had been fairly and legally administered. This Court, through Mr. Justice Butler, held the state statute unconstitutional, saying (p. 5):

> "If the presumption is not unreasonable *and is not made conclusive* of the rights of the person against whom raised, it does not constitute a denial of due process of law. * * * A statute creating a presumption that is arbitrary or that *operates to deny a fair opportunity to repel* it violates the due process clause of the Fourteenth Amendment. * * * *Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property.*" (Italics supplied)

Looking now to the decisions of the lower federal courts and the state courts, we find that the United States Circuit Court for the Northern District of California, in the case of *Southern Pacific R. R. Co. v. Board of R. R. Commissioners of California,* 78 Fed. 236, was called upon to determine the validity of a provision of the constitution of the State of California (Art. 12, §22), which provided that, in all controversies, the rates of fares and freights established by the Board of Rail-

road Commissioners shall be "deemed conclusively" just and reasonable. In holding this provision of the California constitution invalid, Circuit Judge McKenna, speaking for the court, said (p. 258):

> "It is, in effect, admitted, or, at any rate, it is established by authority, that the provision which gives conclusiveness to the rates fixed by the commissioners, is void; * * *."

In the case of *Stuart v. Palmer,* 74 N. Y. 183, the Court of Appeals of New York held invalid a statute of that state (New York Laws 1870, c. 619) which provided for an assessment of taxes without notice, hearing or opportunity to be heard or reviewed.

A statute of the State of Kansas (Kan. Laws 1893, c. 100) provided that in any action brought against any railroad company for failure or neglect to deliver grain, either duplicate of a bill of lading shall be "conclusive proof" of the amount of such grain received by the railroad company. In holding this statute unconstitutional, the Supreme Court of Kansas, in the case of *Missouri, Kansas & Texas Railway Co. v. Simonson,* 64 Kan. 802, said (p. 803):

> "But it is not within the power of the Legislature *to exclude from the courts that which proves the truth of a case,* nor on the other hand, to compel them to receive that which is false in character." (Italics supplied)

In the case of *Vega Steamship Company v. Consolidated Electric Co.,* 75 Minn. 308, 77 N. W. 973, the Supreme Court of Minnesota held invalid a state statute (Minn. Laws 1894, §7675) which provided that a certificate of a weighmaster shall be "conclusive upon all parties as to the matters contained in said certificate."

In the case of *Graves v. Northern Pacific R. R. Co.,* 5 Mont. 556, 6 Pac. 816, the Supreme Court of Montana

held unconstitutional a state statute (Mont. Laws 1881, approved Feb. 23) which provided that a railroad company was liable for cattle killed by it at a valuation to be "conclusively" fixed by appraisers.

In the case of *McCready v. Sexton,* 29 Iowa 356, the Supreme Court of Iowa held unconstitutional a state statute (Iowa Laws, Revision, §784) which declared a tax deed to be "conclusive evidence" of compliance with those matters which are essential to the exercise of the taxing power.

In the case of *Taylor v. Anderson,* 40 Okla. 316, 137 Pac. 1183, the Supreme Court of Oklahoma held unconstitutional a state statute (Okla. Laws 1913, c. 24, p. 41) which provided that the findings of a weighmaster shall be conclusive evidence of weight.

In *Winn v. Whitehouse,* 96 Ark. 42, the Supreme Court of Arkansas held unconstitutional a state statute (Kirby's Digest, Sect. 4820) which provided that the deeds of a commissioner shall be "conclusive evidence" in all courts of a good and valid title in the donee.

In the case of *Wantlan v. White,* 19 Ind. 470, the Supreme Court of Indiana, in an action for a writ of habeas corpus, was called upon to pass upon the constitutionality of an Act of Congress, Feb. 18, 1862 (Acts of 1862, p. 339), which provided that "the oath of enlistment taken by the recruit shall be conclusive as to his age". In holding this provision invalid, the Supreme Court of Indiana said (p. 472):

> "Now it is difficult to see how the oath of a boy that he is eighteen years old can make him so, if, in fact, he has not been in existence for eighteen years; and it has been held, and it would seem that the decision must be correct, that it is not competent for the legislative power to declare what shall be *conclusive* evidence of a fact." (Italics supplied)

Taking up now those cases in which the courts have approved or declared valid rebuttable presumptions of fact, we find that this Court, in the case of *Marz v. Hawthorn,* 148 U. S. 172, was called upon to pass upon the constitutionality of a statute of the State of Oregon (Ore. Laws 1887, 2 Hill's Ann. Laws, 1309 ed. 1892) which provided that a tax deed shall be *"prima facie* evidence" of the title of the grantee. In sustaining the validity of the statute, this Court, through Mr. Justice Shiras, said (p. 182):

> "It is competent for the legislature to declare that a tax deed shall be *prima facie* evidence not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, but that the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, *conclusive* of its own validity, and it cannot, therefore, make the tax deed *conclusive* evidence of the holder's title to the land." (Italics supplied)

In the case of *Fong Yue Ting v. U. S.,* 149 P. S. 698, this Court was considering the validity of a federal statute (Act of Cong. May 5, 1892, c. 60, §6) which required all Chinese laborers within the United States to apply for a certificate of residence, and that any Chinese laborer who did not so apply or was afterwards found without such a certificate should be "deemed and adjudged" to be unlawfully in the United States, "unless" he shall clearly establish to the satisfaction of the court that, by reason of accident, sickness or other unavoidable cause, he was unable to procure his certificate. In sustaining the validity of this statute, this Court, through Mr. Justice Gray, said (p. 727):

> "The meaning of this clause, as shown by those which follow, is *not* that this fact shall thereupon

> be held to be *conclusively* established against him, but only that the want of a certificate shall be *prima facie* evidence that he is not entitled to remain in the United States; * * *" (Italics supplied)

In the case of *Turpin v. Lemon*, 187 U. S. 51, Mr. Chief Justice Brown, speaking for this Court, sustained the constitutionality of a statute of the State of West Virginia (W. Va. Laws 1882, c. 130, sec. 29) which provided that a tax deed shall be *"prima facie* evidence" that the material facts therein recited are true. And, in considering generally the right of a legislature to conclusively determine what it enacts in the form of law, this Court, in *Smyth v. Ames*, 169 U. S. 466, speaking through Mr. Justice Harlan, said (p. 527):

> "The idea that any legislature, state or federal, can *conclusively* determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions." (Italics supplied)

In *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 193 U. S. 53, Mr. Justice McKenna, speaking for this Court, said (p. 63):

> "To establish stations at proper places is the first duty of a railroad company. The State can certainly provide for the enforcement of that duty. An incorporated village might be said to be such a place without an express declaration of the statute. To make it *prima facie* so by statute and to impose the burden of meeting the presumption thence arising certainly does not amount to an invasion of the rights of property or an unreasonable control of property." (Italics supplied)

The leading case involving the validity of rebuttable presumptions is *Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed, Administrator,* 219 U. S. 35. In that case this Court was called upon to determine whether a statute of the State of Mississippi (Miss. Code 1906, Sec. 1985) was repugnant to the Fourteenth Amendment to the Constitution in providing that in all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives shall be *"prima facie"* evidence of the want of reasonable skill and care on the part of the railroad company. In holding the statute constitutional, this Court, through Mr. Justice Lurton, said (p. 43):

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it *must not,* under guise of regulating the presentation of evidence, *operate to preclude* the party from the right to present his defense to the main fact thus presumed." (Italics supplied)

In the case of *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, Mr. Justice Van Devanter, speaking for this Court, held valid a state statute (N. Y. Laws 1908, Vol. 2, 1221, c. 429) which provided that the proof of certain designated facts shall be *prima facie* evidence of the common source of the waters and of the injurious effect of the pumping. Said this Court (p. 82):

> "The statute now before us, as affected by the

ruling mentioned, makes proof of certain designated facts *prima facie, but not conclusive,* evidence of the common source of the waters and of the injurious effect of the pumping, that is to say, it establishes a *rebuttable* presumption, but neither prevents the presentation of other evidence to overcome it nor cuts off the right to make a full defense." (Italics supplied)

A statute of the State of Kansas (Kan. Laws 1907, c. 373, pp. 538, 539) made entries of default and proceedings for forfeiture *prima facie* evidence of the validity of forfeiture proceedings. The validity of this statute was before this Court in the case of *Reitler v. Harris,* 223 U. S. 437. Mr. Justice Van Devanter, in speaking for this Court, said (p. 442):

"By making the entry of forfeiture upon the official record *prima facie, but not conclusive,* evidence that all preliminary steps essential to a valid forfeiture were taken and that the forfeiture was duly declared, it but established a *rebuttable* presumption, which he is at liberty to overcome by other evidence. That such a statute does not offend against either the contract clause or the due process of law clause of the Constitution, even where the change is made applicable to pending causes, is now well settled." (Italics supplied)

In the case of *Luria v. U. S.,* 231 U. S. 9, this Court was called upon to pass upon the constitutionality of a federal statute (Act Cong. June 29, 1906, c. 3592, 34 Stat. 596, 601), which provided that if any alien, within five years after obtaining a certificate of citizenship, shall return to his native country and take permanent residence therein, it shall be considered *"prima facie"* evidence of lack of intention on the part of such alien to become a permanent citizen of the United States at

the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient to authorize the cancellation of his certificate. In sustaining the constitutionality of this statute, this Court, through Mr. Justice Van Devanter, said (p. 25):

> "It will be observed that this provision prescribes a rule of evidence, not substantive right. It goes no farther than to establish a *rebuttable presumption* which the possessor of the certificate is free to overcome." (Italics supplied)

In *Meeker & Co. v. Lehigh R. R.*, 236 U. S. 412, this Court held that the reports and orders of the Interstate Commerce Commission are admissible as *"prima facie"* evidence of facts found and contained therein under the federal statute there involved (Act Congress June 29, 1906, Sect. 16, 34 Stat. 590).

The California Alien Land Law (Calif. Laws 1921, p. Lxxxiii, Sect. 9) provided that acquisition of lands by aliens not eligible to citizenship is unlawful, and that a conveyance to such an alien creates a *prima facie* presumption that the conveyance was made with intent to avoid escheat. This Court, in the case of *Cockrill v. California*, 268 U. S. 258, speaking through Mr. Justice Butler, sustained the validity of this statute, saying (p. 261):

> "It is not, and could not reasonably be, suggested that the statute is repugnant to the due process clause. *It does not operate to preclude any defense.*" (Italics supplied)

In commenting upon the rebuttable presumption in Section 402(c) of the Revenue Act of 1918, (appendix), which provided that any transfer without consideration, made within two years of death, shall be presumed to have been made in contemplation thereof,

"unless shown to the contrary", this Court, in the case of *Wickwire v. Reinecke,* 275 U. S. 101, speaking through Mr. Chief Justice Taft, said (p. 105):

> "It is quite clear that, as held by the Circuit Court of Appeals, the ruling of the trial court was erroneous, and that the decision of the Commissioner of Internal Revenue was *not conclusive,* but only furnished *prima facie* evidence of its correctness * * *
>
> "Upon the issue whether the transfer had been made in contemplation of death, the burden of proof was by the terms of the statute on the petitioner, as indeed it would have been without the special provision of the statute, *because he was the plaintiff.*" (Italics supplied)

In the case of *Ferry v. Ramsey,* 277 U. S. 88, this Court was called upon to pass upon the validity of a state statute (Kan. Laws 1923, c. 9, §164) which provided that the reception of deposits by a banking institution when insolvent shall be *"prima facie"* evidence of knowledge of insolvency on the part of the officers. This Court, through Mr. Justice Holmes, sustained the validity of this statute, saying (p. 94):

> "* * * If without any mention of assent or presumptions or *prima facie* evidence that statute had said: 'Every director of a bank shall be personally liable to depositors for every deposit accepted by the bank after it has become insolvent', all objections would be met by the answer, 'You took the office on those terms'. * * * The mention of assent and evidence of knowledge cannot be pressed to conclusions that the statute manifestly does not allow. * * * But the essential thing is that, whether in a roundabout or a perfectly natural way, the statute has said if you take the office you

must take the consequences of knowledge whether you have it or not."

Looking now to the decisions of the lower federal courts and the state courts, we find that in the case of *Goodlett v. Goodman Coal & Coke Co.*, 192 Fed. 775, the United States Circuit Court of Appeals for the Sixth Circuit, in passing upon a state statute (Tenn. Laws, Shannon's Code, §3748, p. 893) which provided that an instrument proved and acknowledged by the maker or two subscribing witnesses shall be received as evidence in any of the courts of the state, said (p. 778):

> "What is the object of this legislation? It is not contended, as in reason it could not be, that it is beyond the power of the Legislature to enact that instruments, safeguarded as these are, shall be admissible as *prima facie* evidence, *of course not as conclusive evidence.*" (Italics supplied)

The same circuit court of appeals, in the case of *Shwab v. Doyle*, 269 Fed. 321, commented upon the rebuttable presumption feature of Section 202(b) of the Revenue Act of 1916, as amended (appendix), which provided that any transfer without consideration, made within two years of death, shall be presumed to have been made in contemplation thereof "unless shown to the contrary". The court said (p. 333):

> "The presumption is merely a rule of evidence whose enactment is within the legislative competency."

In the case of *Flannery v. Willcuts*, 25 Fed. (2) 951, the Circuit Court of Appeals for the Eighth Circuit had under consideration the same rebuttable presumption involved in the case of *Wickwire v. Reinecke, supra.* In commenting upon this rebuttable presumption, the Circuit Court of Appeals said (p. 953):

"* * * It seems reasonable to suppose that the taxing officials also acted solely in reliance on the statutory presumption; but if that presumption is inconsistent with the facts in the case it must give way. It will have served its purpose,—in effect, so declared by the statute. * * *"

In the case of *In re Lydia Ann Allen,* 82 Vermont, 365, the Supreme Court of Vermont had under consideration the force and effect of a physician's certificate which recited that the petitioner was insane. In holding that the certificate could not be made conclusive of insanity, the court said (p. 376):

"* * * It is, however, within the power of the legislature to prescribe that such a certificate, made in full compliance with the provisions of the statute authorizing it, shall be received as evidence of insanity, and the effect of it, before a court of inquiry, like the one here under consideration, with the modification that it has no power under the pretense of prescribing rules for the presentation of evidence, to go so far as *altogether to preclude* the alleged insane person from establishing his rights in opposition thereto." (Italics supplied)

In the case of *New Orleans, Mobile & Chicago R. R. Co. v. Cole,* 101 Miss. 173, the Supreme Court of Mississippi, following the case of *Mobile, Jackson & Kansas City R. R. v. Turnipseed, supra,* held that when proof is made of injury inflicted by the running of a locomotive and cars of a railroad company, the rebuttable presumption of negligence provided for in the statute (Miss. Laws, Code 1906, §1985) is valid.

In the case of *Columbia Valley Trust Co. v. Smith,* 56 Oregon 6, the Supreme Court of Oregon held valid a statute of that state (Ore. Laws 1905, p. 111), which

provided that a certified copy of the articles of incorporation of a corporation shall be *"prima facie"* evidence of the existence of such corporation and its right to do business. In that case the court said (p. 11):

> "* * * A statute which makes a writing that degree of proof which, unexplained or uncontradicted, is alone sufficient to establish the truth of a legal principle asserted by a party, does not deprive the adverse party of the right freely and fully to prevent at a trial facts tending to prove his theory, but imposes upon him the burden of overcoming the *prima facie* case that was made by receiving the document in evidence."

The above cases are those in which the courts, federal and state, have ruled or commented upon the validity or invalidity of statutory presumptions. An analysis of all of these cases shows that this Court has twice declared unconstitutional a conclusive presumption of fact in the same state statute, has once declared unconstitutional a rebuttable presumption in a federal statute, and has once declared unconstitutional a rebuttable presumption in another state statute; that a United States Circuit Court has declared unconstitutional a conclusive presumption in a state constitution; that four United States District Courts, two United States Circuit Courts of Appeal and the United States Board of Tax Appeals have declared unconstitutional a conclusive presumption in the same federal statute; and that nine state supreme courts have declared unconstitutional conclusive presumptions in state statutes. On the other hand, this Court has approved or declared valid rebuttable presumptions in thirteen different federal and state statutes; two circuit courts of appeal in three different cases have approved rebuttable presumptions in federal and state statutes; and three state

supreme courts have approved rebuttable presumptions in state statutes. These cases abundantly show that all courts have zealously protected the right of the citizen to have his day in court, with full opportunity to be heard. And this protection is afforded against federal as well as against state legislation. Under the Fifth Amendment Congress is prohibited from denying one his day in court just as much as the states are prohibited under the Fourteenth Amendment from denying one his day in court. (*Blackmer v. U. S.*, decided by this Court on February 15, 1932).

There are six other cases, however, in which the *meaning* of statutory presumptions has been considered by the courts and which, at first blush, might seem to indicate that conclusive presumptions are valid. They are the cases of *Harder v. Irwin,* 285 Fed. 402; *U. S. v. Davis,* 50 Fed. (2) 903; *Cardinel v. Smith,* 5 Fed. Cas. 45, #2395; *Michel v. Nunn,* 101 Fed. 423; *Edwards v. Douglas,* 269 U. S. 204; and *Leland v. Commissioner of Internal Revenue,* 50 Fed. (2) 523 (certiorari denied October 26, 1931; rehearing denied November 23, 1931).

In the Harder case, the United States District Court for the Northern District of New York had under consideration the construction of the dividend provision of Section 31(b), Revenue Act of 1917, c. 63, Title XII, 40 Stat. 300, 338, which provided that a distribution by a corporation to its stockholders "shall be deemed to have been made from the most recently accumulated undivided profits and surplus." The court (Cooper, J.) held that (p. 406):

> "The statute *means* that, regardless of the form of the declaration, it is *conclusively presumed* that the distribution is out of the most recently accumulated undivided profits or surplus." (Italics supplied)

In the Davis case, the United States District Court for the Western District of Missouri was called upon to pass on a substantially similar dividend provision in Section 201(e) of the Revenue Act of 1918, 40 Stat. 1060. In that case the court held (p. 904):

> "My view is that the construction contended for by plaintiff is the right one. I can add nothing to what was said by Judge Cooper of the Northern District of New York in *Harder v. Irwin, Collector*, 285 Fed. 402, as to the true *meaning* of the word. It was held by him that the word 'deemed' must be construed as raising a conclusive presumption.
>
> "2. Defendants suggest in briefs that if the statute is so construed it is invalid. The *issue* of constitutionality, however, is not raised in the answer (a mere general denial) and I do not consider it. *12 Corpus Juris* 784." (Italics supplied)

In the Cardinel case, the United States Circuit Court for the District of California was called upon to determine the meaning of a federal statute (Act Cong. July 13, 1866, 14 Stat. 144) which provided that any person who shall offer or expose for sale any of certain designated articles shall be "deemed" the manufacturer thereof, and subject to all the duties, liabilities and penalties imposed by law in regard to the sale of domestic articles without the use of proper stamps denoting the tax paid thereon. In construing the word "deemed" the court said (p. 47):

> "* * * The word 'deemed', in this connection *means* 'judged', 'determined', and when it is enacted that vendor of an article shall for any purpose, 'be deemed the manufacturer thereof', for such purpose, he is to be absolutely considered such manufacturer." (Italics supplied)

In the Michel case, the United States Circuit Court for the Middle District of Tennessee had before it for consideration a federal statute (Rev. Stats. #3244) which provided that every person who, without rectifying distilled spirits, shall, by mixing such spirits with any material, manufacture any compound liquor for sale, shall be "regarded" as a rectifier and as being engaged in the restifying business. In charging the jury, the court said (p. 424):

> "* * * the statute has undertaken to give its own definition, which may, if congress chooses to give such a definition, differ from the ordinary *understanding* of what would be a rectifier." (Italics supplied.

In the Edwards case, this Court was called upon to consider the same dividend provision of the Revenue Act of 1917 as that involved in the Harder case, *supra*. The government contended that the dividends paid in 1917 were conclusively presumed to have been paid of 1917 earnings. In holding that the dividends were taxable at 1917 rather than at 1916 rates, this Court, through Mr. Justice Brandeis, said (pp. 207, 217):

> "The Government contends that * * * the 1917 dividends are conclusively presumed to have been paid out of 1917 earnings.
>
> "To accomplish the purpose of Congress it was necessary that the dividend be deemed to have been paid out of the *available* profits or earnings of the most recent year or years." (Italics supplied)

Following the decision of this Court in the Edwards case, the United States Circuit Court of Appeals for the First Circuit in the Leland case had before it for consideration the dividend provisions of Sections 201(a), (b) and (c) of the Revenue Acts of 1921 and 1924, 42 Stat. c. 136, p. 227, and 42 Stat. c. 234, p. 253, respec-

tively, which were substantially similar to the dividend provisions of the Revenue Acts of 1917 and 1918 involved in the Harder and Davis cases, *supra*. In the Leland case, the Circuit Court of Appeals, relying upon the decision of this Court in the Edwards case, said (p. 525):

> "Nor do we think Congress exceeded its constitutional power by providing that, *so long as* a corporation has on hand earnings and profits accumulated since 1913, any distribution to its stockholders should be *conclusively presumed* to be a dividend out of such earnings or profits. It is evident that Congress intended that a stockholder to whom distributions were made while a corporation had earnings or profits on hand, should not escape the burdens of the income tax law through the directors of the corporation undertaking to make distributions from some other source. *The statute does not convert what is not income into income.* It simply requires that, *while there are* earnings or profits, the distributions to the stockholders shall be made from such earnings or profits, and any distributions made while such earnings or profits *exist* shall be deemed to have been so made." (Italics supplied)

In the Harder, Davis, Cardinel and Michel cases the question of constitutionality was not raised in the pleadings or passed on by the courts. Although this Court in the Edwards case presumably characterized the dividend provision there involved as a conclusive presumption, nevertheless, it did not expressly pass upon its constitutionality, as that question was not raised, nor should it have been; for, as Mr. Justice Brandeis pointed out, this provision was directed to "available" profits and earnings of the most recent

year. In other words, this Court held that the intention of Congress was to tax 1917 dividends at 1917 rates, if, in fact, there were 1917 available earnings. This provision did not, in reality, conclusively determine facts, but merely provided for a conclusive *tax rate based upon facts.* As said by the Circuit Court of Appeals in the Leland case:

> "The statute does not convert what is not income into income."

The statute in the case at bar, however, has converted what is not an asset of the estate into an asset of the estate.

These six cases had to do with the *meaning* of statutes, not the constitutionality thereof. Consequently, none of this group of six cases is authority for the question here involved.

There is one other case, however, in which this Court has held valid a legislative definition of fact. It is the case of *Ruppert v. Caffey,* 251 U. S. 264 (and the related *National Prohibition Cases,* 253 U. S. 350). In that case this Court had before it for consideration the constitutionality of the National Prohibition Act (Act Cong. Oct. 28, 1919, Title I, §1), which provided, among other things, that intoxicating liquors shall be "construed" to mean any liquors which contain in excess of one-half of one per centum of alcohol. This Court sustained the validity of this act on the ground that it was a "war power" of Congress enacted "to promote the Nation's efficiency in men, munitions and supplies * * *" and to effectively enforce the Selective Service Act, which made it "unlawful" to sell intoxicating liquors to soldiers in uniform. Said this Court (pp. 297, 298):

> "Furthermore, recent experience of the mili-

tary forces had shown the necessity of fixing a definite alcoholic test for the purpose of administering the limited prohibitory law included in the Selective Service Act of May 18, 1917, * * * *"

It would seem, then, that a national emergency may justify a legislative definition of fact. However, there is no national emergency involved here, unless it should appear that the Government is becoming bankrupt merely through evasion of estate taxes.

An emergency war measure should not be held as authority for the proposition that Congress may define any fact so long as in the opinion of Congress it is reasonably necessary. There was no alternative to the National Prohibition Act in order to effectively enforce the limited provision in the Selective Service Act against selling intoxicating liquors to soldiers in uniform, but there is an alternative to the conclusive presumption in the estate tax act; in fact there are two alternatives: either re-enact the rebuttable presumption, which is fair, or re-enact a gift tax act which will in *every* case tax gifts *inter vivos*. A gift tax act is constitutional. *Bromley v. McCaughn*, 280 U. S. 124. In Appendix B of the collector's brief there is shown the tendency (among the several states) toward the rebuttable presumption and the abolition of the conclusive presumption.

It is respectfully submitted, therefore, that, in the absence of a showing of a national emergency,, the case of *Ruppert v. Caffey* is not authority for the question here involved.

The statute in question is no more valid than would be statutes which provided that:

(1) Any cohabitation between husband and wife

after the filing of a libel in divorce shall be deemed conclusive evidence of collusion.

(2) The driving of an automobile through a red light or an injury inflicted by the running of a locomotive shall be deemed conclusive evidence of negligence.

(3) The acknowledgment of a married woman in the presence of her husband shall be deemed conclusive evidence of duress.

(4) The drawing of a will by a legatee shall be deemed conclusive evidence of undue influence.

(5) The signature to any document shall be deemed conclusive evidence that the document was read by the person so signing.

(6) The obtaining of a marriage license shall be deemed conclusive evidence of a promise to marry.

(7) The information set forth on a corporate tax return shall be deemed conclusive evidence of the value of corporate assets.

(8). The findings of commissions and boards shall be deemed conclusive evidence of weights, values, quantity, quality, etc.

And so, illustration after illustration may be given to show the length to which Congress may go in legislating facts, if the statute in question be valid, and yet in every one of the above instances there may be an honest and reasonable explanation contradicting the conclusive presumption.

It is one thing merely to tax all complete and irrevocable gifts made within two years of a particular event and quite another thing to provide that all such gifts within two years of a particular event are conclusively

presumed to have been made in contemplation of the particular event and are therefore taxable. Even in the first case, if the particular event were death, the omission of the definition would not save the statute, if the statute were an enactment for the imposition of estate taxes, because estate taxes on complete and irrevocable gifts *inter vivos* are laid *only* upon the theory of contemplation of death, so expressed in the statute. That is to say, an *estate* tax cannot be laid merely upon complete and irrevocable gifts made within two years of the donor's death, because there is no transfer as "at death", and consequently no theory at all upon which to base such a tax.

The cases cited in Appendix C of the brief for the collector, with the exception of *Ruppert v. Caffey, supra, National Prohibition Cases,* 253 U. S. 350, and *Hawkins v. Bleakly,* 243 U. S. 210, are not in point. There were no legislative definitions in the statutes there involved. In *Powell v. Pennsylvania,* 127 U. S. 678, the prohibition was directed against all sales of oleomargarine, without a definition of quality. In *Jones v. Brim,* 165 U. S. 180, the statute was directed against driving cattle over certain highways, without a definition of negligence. In *Hawker v. N. Y.,* 170 U. S. 189, the prohibition was directed against the practice of medicine except by persons of good character, but there was no definition of character. In *Otis v. Parker,* 187 U. S. 606, the prohibition was directed against all sales of stock on margin, but there was no definition of either *bona fide* sales or gambling sales. In *Silz v. Hesterberg,* 211 U. S. 31, the prohibition was directed against the possession of certain types of game, but there was no definition of either domestic game or of foreign game. In *Purity Extract Company v. Lynch,* 226 U. S. 192, the prohibition was directed against the sale of malt liquors,

but there was no definition of malt liquors. The case of *Hebe Co. v. Shaw,* 248 U. S. 297, was concerned with a prohibition directed against sales of adulterated condensed milk, but the statute did not contain any definition of wholesomeness. In the case of *Pierce Oil Corp. v. City of Hope,* 248 U. S. 498, the prohibition was directed against the storage of gasoline within certain districts, but there was no definition of danger. In *Everard's Breweries v. Day,* 265 U. S. 545, and in *Lambert v. Yellowley,* 272 U. S. 581, the prohibition was directed against prescribing intoxicating malt and spirituous liquors by physicians, but there was no definition of intoxicating or malt liquors nor the injurious effect thereof. In *Euclid v. Ambler Co.,* 272 U. S. 365, the prohibition was directed against the establishment of industries in certain districts, but there was no definition of offensiveness or danger.

In *Hawkins v. Bleakly,* 243 U. S. 210, an attack was made by an employer against a number of provisions in the Elective Workmen's Compensation Act of the State of Iowa. One of these provisions provided that if it should be found that an employer had requested an employee to elect to reject the act, the rejection should be conclusively presumed to have been procured through fraud and should be null and void. In passing upon this particular provision of the act, this Court said that the provision is a "permissible" regulation in aid of the general scheme of the act"; after, however, recognizing the doctrine "that appellant is an employer, and will not be heard to raise constitutional objections that are good only from the standpoint of employees * * *". Hence it would seem that the sanction of this Court to this particular provision was merely by way of *obiter dictum.* The case of *Ruppert v. Caffey,* 251 U. S. 264 (and the *National Prohibition Cases,* 253 U. S. 350, on the same subject) has been discussed *supra.*

Consequently, the cases cited in Appendix C of the brief for the collector are not authority for the constitutional validity of the statute in question, because, under the provisions of the statute in question, the tax is not merely laid upon all complete and irrevocable gifts made within two years of death, but a definition of such gifts is made and then the tax is laid, based solely upon the definition. The statute in question provides for a conclusive definition of fact, whereas eleven of the fourteen cases cited in Appendix C of the collector's brief provide for conclusive *enforcement,* based, however, upon fact, not upon fiction.

The legislature may not lay an income tax based upon a fiction which is contrary to the fact. It was so held by this Court in *Hoeper v. Tax Commission of Wisconsin et al.,* 52 S. Ct. 120, in an opinion by Mr. Justice Roberts, in part, as follows (p. 122):

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a State to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income."

Likewise, the legislature should not lay an estate tax based upon a fiction which is or may be contrary to the fact. The fiction may be fact in some cases, but the claimed necessity to prevent estate tax evasion in those cases is no ground to validate the act. Constitutional rights are superior to this claimed necessity. *Schlesinger v. Wisconsin and Hoeper v. Tax Commission of Wisconsin et al., supra.*

Under the second sentence of Section 302(c) here involved, the executors are denied *all* opportunity to

show the facts. Actual intention, thought, belief, motive, age, health, value, etc., should always be left open to proof; never determined by legislative fiat. The statute in question is a legislative definition of what a gift in contemplation of death is. Under it, fiction has supplanted fact, and we become a government of unreality, not of truth.

The difference between the Schlesinger case and the case at bar is that one involves a state law and a six-year period and the other a federal law and a two-year period. There is no material difference between federal legislation, as such, and state legislation, as such. Nor is there any material difference between a six year period and a two year period. The reasonableness of the length of any given period is immaterial to the question here involved. The decision of this court in the Schlesinger case did not rest upon the unreasonableness of a six year period but upon the disregard for actualities and the discrimination between like gifts made at different times. Consequently, the difference between the Schlesinger case and the case at bar is one of degree, not of principle.

If the conclusive presumption here involved be declared valid by this Court, upon what ground shall this Court hereafter reject another conclusive presumption? It is submitted that there is no middle course for this Court to follow. If the bars which prohibit legislation of this sort are to be let down in this case, then utter confusion will be the probable final result. (*U. S. v. MacIntosh*, 51 S. Ct. 570, 575.)

In his dissenting opinion in the Schlesinger case, Mr. Justice Holmes said (p. 241):

> "If the time were six months instead of six years I hardly think that the power of the state

to pass the law would be denied, as the difficulty of proof would warrant making the presumption absolute; and while I should not dream of asking where the line can be drawn, since the great body of law consists in drawing lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall."

The executors do respectfully deny the power of the state to pass a six months' law, or any other period of conclusiveness, no matter how long or short it may be, even though suspicion may suggest that large gifts within a short period before death possibly were made in anticipation of it. On the other hand, there are accidental death cases and those cases such as *Hall v. White, supra,* where the gift was a wedding present to a daughter; cases in which there could be no suspicion that death was anticipated.

A gift made, not in contemplation of death, on March 1, 1927, is a fact at that time, although death within two years therefrom is said to change the fact. If a fact *actually* existed on one date, can a subsequent event, over which there is no control, retroactively change that fact to something else? We submit that it cannot.

Should truth ever be immaterial? Is it ever necessary to violate the Constitution? The decision of this Court on this phase of the question is of the profoundest importance. It would almost seem that this Court is now about to determine the materiality of truth in daily life, for taxation is but a part of the field of general legislation. It is respectfully urged that this Court disaffirm the type of legislation which provides for fic-

tion instead of fact, unless there exists a national emergency.

The collector urges that the tax in question is payable by the estate of the donor and therefore is distinguishable from the Wisconsin tax in the Schlesinger case, which was payable by the donee. What difference does it make whether it is called an estate tax and payable by the estate or whether it is called an inheritance tax and payable by the beneficiary? In both cases the tax is laid on a transfer occasioned by death and the practical operation and effect of the conclusive presumptions are the same in each case.

The collector also urges that the rebuttable presumption is ineffective. That is to say: the administrative or judicial branches of the government, or both, cannot or do not effectively enforce the law. There is nothing in the record to support this contention, nor is it material to the question here involved. However, the federal courts and the Board of Tax Appeals, to say nothing of unreported cases in the Bureau of Internal Revenue, have effectively enforced the rebuttable presumption under prior revenue acts in the following cases, in which the gifts there involved were held to have been made in contemplation of death:

Schwing v. Com. of Int. Rev., 3 B. T. A. 697.
Ward v. Com. of Int. Rev., 3 B. T. A. 879.
Kahn v. Com. of Int. Rev., 4 B. T. A. 1289.
Dupignac v. Com. of Int. Rev., 6 B. T. A. 278.
Lehman v. Com. of Int. Rev., 6 B. T. A. 791.
Serrien v. Com. of Int. Rev., 7 B. T. A. 1129.
Kelly v. Com. of Int. Rev., 8 B. T. A. 1193.
Hammon v. Com. of Int. Rev., 10 B. T. A. 43.
Doyle v. Com. of Int. Rev., 12 B. T. A. 1044.
Burling v. Com. of Int. Rev., 13 B. T. A. 264.

Wheelock v. Com. of Int. Rev., 13 B. T. A. 828.
Latham v. Com. of Int. Rev., 16 B. T. A. 48.
Hale v. Com. of Int. Rev., 18 B. T. A. 342.
Sugerman v. Com. of Int. Rev., 20 B. T. A. 960.
McClure v. Com. of Int. Rev., 20 B. T. A. 1127.
Baum v. Com. of Int. Rev., 21 B. T. A. 176.
Safe Deposit & Trust Co. v. Tait, 295 Fed. 429.
Rengstorff v. McLaughlin, 21 Fed. (2) 177.
Sizer et al. v. U. S., 65 Co. Cl. 450.
Luscomb v. Com. of Int. Rev., 9 B. T. A. 1070; affirmed by C. C. A. (2), 30 Fed. (2) 818.
Von Ruck v. Com. of Int. Rev., 14 B. T. A. 33; affirmed by C. C. A. (4), 44 Fed. (2) 476.
Neal v. Com. of Int. Rev., 16 B. T. A. 1058; affirmed by C. C. A. (8), 53 Fed. (2) 806.
Milliken v. U. S., 38 Fed. (2) 381 (Co. Cl.); affirmed by U. S. S. Ct., 51 S. Ct. 324, 326.
Brown v. Routzahn, decided by U. S. D. C., N. D. of Ohio, E. D., on Sept. 9, 1931, #1818 of Prentice-Hall 1931 Fed. Tax Service (not yet officially reported).

Perhaps it has never occurred to Congress or the collector that cases which the taxpayer estates have won, and where the gifts were held not to have been made in contemplation of death, were correctly decided.

It is respectfully submitted that the statute in question operates to deny the executors a fair opportunity to prove the truth, denies them their day in court, and therefore deprives them of their property without due process of law.

Point (2) Equal Protection.

The executors contend that this sentence also violates the due process clause of the Fifth Amendment, in that it denies equal protection of the laws.

Although the United States is not expressly prohibited in the Constitution from denying equal protection of the laws, as the states are by the Fourteenth Amendment, nevertheless, this Court has repeatedly held that, where there is no reasonable ground for selecting particular individuals or corporations, or classes of such, out of the general mass of individuals or corporations, a legislative enactment directed against such individuals or corporations amounts to a denial of due process of law as far as their property is concerned. In *Smyth v. Ames,* 169 U. S. 466, this Court reviewed the authorities, and throughout that case, indeed, the requirement of due process of law is treated as necessarily including equal protection within its scope.

The executors contend that there is no adequate basis for selecting non-testamentary gifts made within two or six years of death and taxing them and exempting *like* gifts made beyond such periods. The line drawn by the legislature is arbitrary, capricious and amounts to confiscation, denying equal protection of the laws and therefore denying due process of law. *Schlesinger v. Wisconsin, supra.*

A case very similar to the one at bar was the case of *Louisville Gas & Electric Company v. Coleman,* 277 U. S. 32. In that case this Court was called upon to pass upon the validity of a statute of the State of Kentucky (Ky. Stats., Carroll's Ed., 1922, §4019a-9), which provided in part:

> "A tax of twenty cents (20¢) is hereby imposed upon each one hundred dollars ($100.00) or

fraction thereof, in any contingency secured by any mortgage of property in this state, which mortgage shall be lodged for record after this Act goes into effect *where the indebtedness does not mature within five years.* * * *"

In holding the Kentucky statute invalid this Court said (p. 37):

"The equal protection clause, like the due process of law clause, is not susceptible to exact delineation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. * * * *mere difference is not enough*: * * *."

This Court then went on to comment upon the particular case and said (p. 38):

"* * * Whether the tax now in question be called a privilege tax or a property tax, it falls in effect upon one indebtedness and not upon another where the sum of each is the same; where both are incurred by corporations, or both by natural persons; where the percentage of interest to be paid is the same; where the mortgage security is identical in all respects; where, in short, *the only difference well may be that one is payable in 60 months and the other in 59 months.* * * *" (Italics supplied).

Mr. Justice Holmes, in dissenting from the majority opinion, said (p. 41):

"When a legal distinction is determined, as no one doubts that it may be, between day and night, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the *necessity* behind it, the

line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But *when* it is seen that a line or point there *must* be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." (Italics supplied).

Mr. Justice Holmes indicated that the decision of the legislature must be accepted because of the "necessity" to draw a line and mark the place where the change occurs. He illustrated by citing the necessity to draw the line between "day and night, childhood and maturity, or any other extremes". But, is not this rule of necessity only applicable when a "change" actually takes place between opposite extremes, such as day merging into night or childhood into maturity?

In the case at bar the rule of necessity is not applicable, because there are no opposite extremes. A point of time, alone, is the legislative line of supposed change. Without more, time, itself, is not composed of opposite extremes, which merge or change one into the other. A gift made on Monday is no different than a *like* gift made on Tuesday. Consequently, the statute in question makes a distinction without a difference and this is arbitrary and capricious.

There is no attempt upon the part of Congress to distinguish between different values, for the values taxable in all cases are those "at death". Nor is there any attempt upon the part of Congress to distinguish between gifts of different percentages. Congress has not said, for instance, that gifts of 75% of a decedent's estate are conclusively presumed to have been made in contemplation of death, if within two years thereof, and

those of 25% are not. There is, therefore, no distinction based upon a difference in values or percentages.

Mr. Justice Holmes also indicated that it might be necessary to draw a line "gradually picked out by successive decisions" of this Court. This, presumably, is an alternative to, or at least a check upon, legislative action. By a process of elimination, through successive decisions, this Court, itself, would eventually be compelled to draw the line and find the fact.

To illustrate, there is now on the federal statute books a two-year law. If this two-year law be upheld by this Court, "not being very wide of any reasonable mark", then there will be two decisions of the same court, one upholding a two-year law and one rejecting a six-year law. A succeeding Congress may very likely then be tempted to increase the period to three years, as the Kentucky legislature did in *State Tax Commission v. Robinson's Executors, supra.* Or an appeal will be taken to this Court involving the Kentucky three-year period. This Court will then be called upon to determine whether or not the three-year period is "very wide of any reasonable mark", and so, case after case may reach this Court, each involving a different period between the two *judicial* extremes. Finally, this Court will be compelled to draw *its own* line.

Let it be supposed that the line is finally drawn midway between the judicial extremes at four years, and certainly it must be drawn sometime, somewhere, if the alternative rule of judicial elimination is followed. What situation will then exist? A situation where this Court will have decided that decedents on one side of the four-year line contemplate death and those on the other side do not, and this decision will be binding not only upon Congress but upon the forty-eight state legislatures.

Is this not a finding of fact by the judiciary—the very thing our Constitution prohibits? Was it not judicial legislation of facts that resulted in *Magna Charta*, the Bill of Rights and the Constitution? Would this Court be willing to find a fact for a litigant against his will? We believe not. It is the province of the jury to find facts.

The statute in question is no more valid than would be statutes which provided that all income tax returns filed after March 15th of any given year shall be deemed fraudulent, or that all judges who are in commission at the age of eighty years shall be deemed incompetent to serve thereafter and therefore must retire. Manifestly, such provisions would be arbitrary, because, in truth and in fact, the passage of time at a particular point does not, in itself, mark a change from honesty to fraud, competency to incompetency. Likewise, the passage of time at a particular point does not, in itself, mark a change from thoughts about life to thoughts about death.

It is, therefore, respectfully submitted that the dissenting opinion of Mr. Justice Holmes in the Louisville Gas and Electric Co. case is not applicable to a case such as the one at bar, where a point of time, alone, is the legislative line.

Classification for purposes of taxation is necessary and proper. But, it is one thing to classify physical objects, such as intoxicating liquor, oleomargarine, chain stores and the like, and another thing to classify intangibles such as thoughts. The individual should still be allowed his freedom of belief, intention and thought. If the individual can have no motive apart from the mass; if he is *compelled* to have the same thoughts as others; if, in short, the sovereignty can

legislate intention for one and all, then we are a despot, not a republic.

No other statute, so far as we are able to determine, except the Wisconsin and Kentucky statutes already declared invalid, has ever gone so far as to rigidly classify mentality, and then impose a burden upon one classification and exempt the other. The legislature might as well draw a fixed and unalterable line between honesty and fraud, negligence and care, sanity and dementia, ignorance and knowledge. If the statute in question be declared valid, it is then but a short step to legislation classifying speech and the press, for they are but the expressions of mentality; and yet the First Amendment prohibits Congress from "abridging the freedom of speech or of the press".

At the time of the adoption of the Constitution freedom of conscience was an acknowledged, inalienable right. Is it possible that conditions could become ever so modern and complicated that this inalienable right should be restrained? Do the needs of modern life require classification of the mental as well as the physical? True, the welfare of the community demands progressive and analytical legislation to meet modern conditions; but modern conditions do not even tolerate a classification of thought. On the contrary, the modern and liberal thinker demands absolute freedom of thought. Shall our modern doctrine of classification become top-heavy and cast us back into mediaeval civilization?

Reasonable men differ in their beliefs and intentions; which is all the more reason why intention should not be fixed by legislative definition. The foundations, not only of our Constitution, but of civilization, begin to totter at the thought of the validity of the statute in question. The history of the world attests the struggle for freedom of mind. It is the product of the ages. To

classify mentality, as this statute has done, would defeat the ideals and purposes for which this country was founded. No particular mental process should be fixed by legislative definition and other mental processes free.

It is respectfully submitted that mentality is, and of right ought to be, free and never subject to legislative fiat.

The legislature may provide for retroactive taxes, but whether transfers such as those here involved, will ever be taxed is, as said by the Court in *Frew v. Bowers*, 12 Fed. (2) 625 (p. 630):

> "* * * fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grevious injustice."

There was no classification of gifts in contemplation of death under prior revenue acts. The 1926 Act substituted a definition for a rule of evidence—a rigid classification for no classification at all. This Court is not concerned with whether a two year period may be reasonable in itself, but whether any period may be made the basis for a rigid classification of mentality. *Schlesinger v. Wisconsin, supra.*

In determining the validity of classification, the practical operation and effect of the legislation must be considered. *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 401; *Near v. Minnesota, ex rel. Olson*, 51 S. Ct. 625, 628.

Specifically, then, how does the statute operate? If a gift, not in contemplation of death, is made 730 days before death, it is taxable, but if a *like* gift is made 731 days before death, it is exempt. This is the practical operation and effect. There is no adequate or reasonable basis for this classification. As said by this Court in the *Louisville Gas & Electric Co. case, supra*:

> "* * * the only difference well may be that one is payable in 60 months and the other in 59 months. * * *"

Furthermore, a gift of $5,000 or less, made within two years of death, is exempt from the tax. That is to say—if a $25,000 gift is made within two years of death, it is, for the purposes of the tax, made from two motives; $20,000 being motivated by thoughts of death and $5,000 by purposes associated with life. This also indicates the arbitrary nature of the statute, and much more so than the Wisconsin statute in the Schlesinger case.

It is respectfully submitted that the statute in question denies equal protection, in that it is arbitrary and capricious and therefore deprives the executors of their property without due process of law.

Question 2. If the Answer to the First Question Be in the Negative, Is the Second Sentence of Section 302(c) of the Revenue Act of 1926 Void Because Repugnant to Sections 1111, 1113(a), 1117 and 1122(c) of the Same Act?

Sections 1111, 1113(a), 1117 and 1122(c) of the Revenue Act of 1926 (appendix), taken as a whole, provide for a complete system of corrective justice whereby, after payment, actions may be instituted in court for the recovery of taxes illegally collected. This system is reasonable and complete and affords the taxpayer an opportunity to show in court that the taxes

paid by him were illegally and unlawfully assessed and collected. Being a system of "corrective" justice, *all* questions of law *and* fact upon which the tax was based are to be judicially determined. The system gives a taxpayer his complete day in court.

In the case of *Cheatham v. U. S.*, 92 U. S. 85, this Court said (p. 88):

> "* * * In these respects, the United States have, as was said by this court in *Nichols v. United States*, 7 Wall. 122, enacted a *system of corrective justice*, as well as a system of taxation, in both its customs and internal revenue branches. That system is intended to be *complete*. In the customs department it permits appeals from appraisers to other appraisers, and in proper cases to the Secretary of the Treasury; and, if dissatisfied with this highest decision of the executive department of the government, the law permits the party, on paying the money required, with a protest embodying the grounds of his objection to the tax, to sue the government through its collector, and *test in the courts the validity of the tax.*" (Italics supplied)

To the same effect are the cases of *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 Howard 272; *State Railroad Tax Cases*, 92 U. S. 575; *Wickwire v. Reinecke*, 275 U. S. 101; *Fidelity & Columbia Trust Co. v. Lucas*, 7 Fed. (2) 146. In the latter case, the District Court said (p. 151):

> "Section 3226, Revised Statutes, *supra*, with but slight changes, had been in effect since 1866; and literally thousands of suits against collectors have been maintained under it. * * *"

There are only four theories upon which to lay estate taxes, viz: upon gifts transferred (1) through testacy, (2) through intestacy, (3) *inter vivos* but intended to take effect in possession or enjoyment at or

after death and (4) *inter vivos* but in contemplation of death. "Since 1866" taxpayers have had the right to test in court the application of the theory upon which their taxes have been collected and paid, and this right was not taken away by the Revenue Act of 1926, because Section 3226, Revised Statutes, was reenacted therein as Section 1113(a). There could hardly be any denial that under prior revenue acts the executors would have had the right to invoke this system of corrective justice to test in court the application of the fourth theory, if the government had collected taxes thereupon. In spite of the conclusive presumption, estate taxes on complete and irrevocable gifts *inter vivos*, made within two years of death, are nevertheless collectible under the 1926 Act *only* upon the application of the fourth theory. Consequently, after paying an estate tax under the Revenue Act of 1926 on a gift said to have been made in contemplation of death, the executors still have the right, under this system of corrective justice, to test in court the application of this theory to the gift.

If for over half a century Section 3226, Revised Statutes (1113(a) R. A. 1926), has been in force and effect, then it is the paramount expression of the legislative will, when compared with a contrary expression enacted for the first time in the Revenue Act of 1926.

In construing statutes it is a well settled principle that the last expression of the legislative will is the law, and that, if both expressions were enacted at the same time and it is impossible to reconcile them, then the last in order of arrangement prevails. *U. S. v. Jackson*, 143 Fed. 783.

The purpose of the second sentence of Section 302(c) is just the opposite of Section 1113(a). Instead of being a part of a system of corrective justice, it seeks to destroy justice by prohibiting proof of the truth. A provision which seeks to destroy justice is absolutely

irreconcilable with a provision which seeks to afford justice. If a taxpayer is deprived of his right to prove the truth by an earlier section, he cannot, in the same case and at the same time, be allowed to prove the truth by a later section. One of these sections must give way, and, where they are absolutely irreconcilable, the general rule is that the latest and paramount expression of the legislative will prevails.

The collector urges that if the second sentence of Section 302(c) is not in violation of the Fifth Amendment and does not deny the taxpayer due process, then intrinsically it is a legal enactment, and, if it is a legal enactment, the taxes collected under it were legally collected. True, a constitutional enactment, but not necessarily a legal enactment.

A statute may not violate the Constitution but still be illegal *for another reason.* Every statute declared illegal and void is not also unconstitutional. Rules of statutory construction such as repugnancy, duplicity, ambiguity, redundancy, surplusage or aptness of title, have nothing to do with constitutionality.

Consequently, the statute in question is void, in that it is repugnant to the later and paramount expression of the legislative will in the same act.

Conclusion.

It is, therefore, respectfully submitted that both the questions certified should be answered in the affirmative.

Respectfully submitted,

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APPENDIX.

Laws Cited.

Section 302 (a), (b), (c), (d), (e), (f) and (g), Revenue Act of 1926, 44 Stat. 70, 71.

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death.

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy; * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within *two years* prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be *deemed and held* to have been made in contemplation of death within the meaning of this title. Any

transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, * * *

(f) To the extent of any property passing under a general power of appointment * * *

(g) To the extent of the amount receivable by the executor as insurance * * *" (Italics supplied).

* * * * * *

Section 202 (b), Revenue Act of 1916, 39 Stat. 777, 778.

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated: * * *

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, ex-

cept in case of a *bona fide* sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death within the meaning of this title"; (Italics supplied).

Section 402(c), Revenue Act of 1918, 40 Stat. 1097.

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a *bona fide* sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death within the meaning of this title;" (Italics supplied).

* * * * * *

Section 402(c), Revenue Act of 1921, 42 Stat. 278.

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a *bona fide* sale for a fair consider-

ation in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death within the meaning of this title;" (Italics supplied).

* * * * * * *

Section 302(c), Revenue Act of 1924, 43 Stat. 304.

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a *bona fide* sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death within the meaning of Part I of this title;" (Italics supplied).

Section 1111, Revenue Act of 1926, 44 Stat. 115.

"Section 3220 of the Revised Statutes, as amended, is amended to read as follows:

'Sec. 3220. Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate and gift taxes, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be un-

justly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section.'"

* * * * * * *

Section 1113 (a), Revenue Act of 1926, 44 Stat. 116.

"Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

'Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of

six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceedings relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.'"

* * * * * *

Section 1117, Revenue Act of 1926, 44 Stat. 119.

"Section 177 of the Judicial Code, as amended, is amended to read as follows:

'Sec. 177. (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

'(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any over-payment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.'"

* * * * * *

Section 1122 (c), Revenue Act of 1926, 44 Stat. 121.

"The paragraph added by section 1310 of the Revenue Act of 1921 at the end of paragraph Twentieth of section 24 of the Judicial Code, relating to the jurisdiction of district courts, as amended, is reenacted without change, as follows:

> 'Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.'"

* * * * * *

Fifth Amendment to the U. S. Constitution.

"No person shall * * * be deprived of life, liberty, or property without due process of law; * * *"

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CHARLES ELMORE

No. 514.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

D. B. HEINER, Collector of Internal Revenue,
Appellant,

v.

JOHN H. DONNAN, *et al.*, Executors and Trustees of the Estate of John W. Donnan,
Appellee.

ON CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF.

WAYNE JOHNSON,
50 Broadway,
New York City.

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No. 514.

IN THE

Supreme Court of the United States

D. B. HEINER, Collector of Internal Revenue,

Appellant,

v.

JOHN H. DONNAN, *et al.*, Executors and Trustees of the Estate of JOHN W. DONNAN,

Appellee.

ON CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

The undersigned respectfully moves the Court for leave to file the accompanying brief in this case as *amicus curiae.*

This application is made as counsel for the Estate of Percy R. Pyne, deceased, late of Somerset County, New Jersey. The Federal estate tax return for the above named estate, filed pursuant to law, disclosed transfers within two years of his death of property valued at more than $4,500,000.00. Although not admitted or shown to have been made in contemplation of death, the transfers have been included

in the taxable estate by the Commissioner of Internal Revenue at the value of the property on the date of the decedent's death, pursuant to the provisions of the second sentence of Section 302 (c) of the Revenue Act of 1926, and the Commissioner proposes to assess and collect a tax thereon in an amount in excess of $700,000.00. The Estate of Percy R. Pyne, therefore, has a vital interest in the questions now before the Court, relating to the validity of the second sentence of Section 302 (c).

WHEREFORE, leave to file the accompanying brief is respectfully requested.

WAYNE JOHNSON,
Counsel for the Estate of Percy R. Pyne.

No. 514.

IN THE

Supreme Court of the United States

D. B. HEINER, Collector of Internal Revenue,

Appellant,

v.

JOHN H. DONNAN, *et al.*, Executors and Trustees of the Estate of JOHN W. DONNAN,

Appellee.

ON CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF *AMICUS CURIAE*.

The United States Circuit Court of Appeals for the Third Circuit on November 11, 1931, certified to this Court the following questions:

1. Does the second sentence of Section 302 (c) of the Revenue Act of 1926 violate the due process clause of the Fifth Amendment to the Constitution of the United States?

2. If the answer to the first question be in the negative, is the second sentence of Section 302 (c) of the Revenue Act of 1926 void because repugnant to Sections 1111, 1113 (a), 1117 and 1122 (c) of the same Act?

The Statute.

Act of Congress approved February 26, 1926, Chapter 27 (44 Stat. 9):

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Sec. 1111. Section 3220 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3220. Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926 the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section."

Sec. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary

of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 1117. Section 177 of the Judicial Code, as amended, is amended to read as follows:

"Sec. 177. (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

"(b) In any judgment of any court rendered after the enactment of the Revenue Act of 1926 (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any internal-revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or for any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws, interest shall be allowed at the rate of 6 per centum per annum upon the amount of such tax, penalty, or sum, from the date of the payment or collection thereof to the date of entry of such judgment or, if

such judgment is reviewed by an appellate court, to the date of entry of final judgment."

Section 1122. * * *

(c) The paragraph added by Section 1310 of the Revenue Act of 1921 at the end of paragraph Twentieth of Section 24 of the Judicial Code, relating to the jurisdiction of district courts, as amended, is re-enacted without change, as follows:

> "Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced."

POINTS.

1. The statutory provision in question purporting to impose an estate tax on gifts not in fact made in contemplation of death is so arbitrary and capricious as to amount to confiscation and deprives the taxpayer of rights guaranteed by the Fifth Amendment of the Constitution.

2. This Court has held that a similar provision in a State statute violates the Fourteenth Amendment, from

which it follows that the statute here in question is invalid under the Fifth Amendment.

3. The rights guaranteed by the Fifth Amendment of the Constitution are superior to the supposed necessity for this legislation.

4. The statutory provision in question cannot be sustained as a tax on gifts *inter vivos*.

5. There is complete unanimity of opinion in the decisions of the lower courts that the enactment in question is unconstitutional.

6. Furthermore, the second sentence of Section 302 (c) is void because repugnant to subsequent provisions of the same Act.

ARGUMENT.

POINT I.

The statutory provision in question purporting to impose an estate tax on gifts not in fact made in contemplation of death is so arbitrary and capricious as to amount to confiscation and deprives the taxpayer of rights guaranteed by the Fifth Amendment of the Constitution.

The challenged enactment plainly undertakes to raise a conclusive presumption that gifts were made in contemplation of death when made within two years of death and after the enactment of the Act, if the value exceeds $5,000.00, regardless of whether they were in fact made in

contemplation of death. It requires the inclusion of the value of the gifts at the time of the death of the donor in the net estate which is subject to the transfer tax imposed. The statute disregards facts and ignores the actual intent or motive of the donor in making the gift. It admits of no proof contrary to the conclusive presumption which it seeks to raise.

With respect to gifts made more than two years prior to death, or gifts made within two years of death but prior to the enactment of the 1926 Act, proof is permitted to establish that the gifts were not made in contemplation of death and thus avoid the tax. Even with respect to gifts made within the two year period, proof is permitted to establish that gifts were not made in contemplation of death, if their value at the date of death does not exceed $5,000; but if their value exceeds that sum, the law attempts to apply a conclusive presumption and excludes all proof of the real facts.

Thus, gifts made under the same circumstances and admittedly not made in contemplation of death may fall into different classifications for estate tax purposes, solely because in one case the donor chances to die within two years after the transfer, and in another case the donor survives that period, or because one is made prior to the enactment of the law and the other is made thereafter, though both are within two years of death, or because one is valued at $5,000 or less at the date of death of the decedent and the other is valued at more than that sum.

If like gifts are made on successive days there is no difference in law between them, yet under the statute one such gift may be taxable, whereas the other is exempt. There is no basis for any legal distinction between a gift of $5,000

and a gift of $5,001, if we assume that both gifts are made under the same circumstances, but again the statute may operate to classify one such gift as subject to taxation and the other as exempt. Thereby, it makes a distinction where there is no difference. Such a classification of subjects of taxation is arbitrary, capricious and discriminatory.

No question is here raised as to the power of Congress to tax gifts actually made in contemplation of death, nor can any such question properly be raised in view of this Court's decision in *Milliken* v. *United States*, 283 U. S. 15. The inclusion of that type of gift in the taxable estate was there upheld as a permissible classification of a proper subject of taxation to secure equality of taxation and to prevent evasion of estate taxes. However, to justify the imposition of such a tax the necessary basis of fact must exist. The Congress can make the law apply to the facts but it cannot make the facts to which the law is to apply. When the Congress undertakes to engraft upon a simple gift *inter vivos* the legal import of a gift made in contemplation of death it is giving to the gift the legal import of a fact essentially different in nature, and when Congress uses this method to apply a transfer tax on testamentary dispositions to gifts without testamentary character it goes beyond the congressional power.

Schlesinger v. *Wisconsin Tax Commission*, 270 U. S. 230;
Nichols v. *Coolidge*, 274 U. S. 531, 542.

Under the doctrine in *Milliken* v. *United States, supra*, the donee of a gift actually made in contemplation of death may be considered as taking the gift subject to the excise tax, but this principle cannot be applied to the donee of a

bona fide gift *inter vivos*. He takes the property as and for his own without any restrictions or limitations and when Congress attempts to create a legal fiction that such a gift is a testamentary disposition if the donor chances to die within two years and then to subject it as such to the estate tax, it goes beyond its constitutional powers in much the same way as it did in the Revenue Act of 1924, by which it attempted to apply the gift tax provisions to gifts completed prior to the enactment of the law. This Court denied the power of the Congress to tax such gifts. *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Anderson*, 276 U. S. 440. The point was stressed as the basis of the Court's decisions that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax. While here the law does not attempt to apply the tax to transactions which were completed prior to its enactment, the effect is much the same because the event which gives rise to the tax is the death of the donor within an arbitrary time after the gift, a circumstance which neither the donor nor the donee contemplated at the time of the gift. The tax is not based on the circumstances under which the gift was made but upon the accidental happening of an event having no relation to the gift. This event—death—was not in contemplation of the parties at the time the gift was consummated and hence the nature and amount of the tax burden, or indeed whether there would be any tax, could not have been foreseen or understood at the time of the gift. Until the death of the donor or the expiration of two years no one could tell the amount of the tax, or whether there would be any tax at all.

After attempting to close the door to proof of the real facts and endeavoring to give to simple gifts the legal import of testamentary gifts, the enactment in question purports to subject the value of the gifts at the death of the donor to a transfer tax which cannot be applied to all gifts or indeed to any gift without testamentary character. This is not a tax, but a confiscation of the property without due process of law in violation of the Fifth Amendment.

It is conceivable that an individual might from motives entirely apart from anticipation of death transfer substantially all of his property by way of gift so that at the time of his death, within two years, no property would be left in his estate to satisfy the purported tax. In such event the donee under Section 315 (b) of the statute would become personally liable for the tax and the property received by him would be subject to a lien. A somewhat similar situation was before this Court in *Levy* v. *Wardell*, 258 U. S. 542. In that case Henriette Levy had transferred in 1902 and 1903 certain shares of stock to her three children. The transfers were not made in contemplation of death. The donor died September 15, 1916. She left no property or estate whatever and consequently there was no estate to administer. The Commissioner of Internal Revenue, assuming to act under the provisions of the Act of Congress of September 8, 1916, assessed an estate tax of $12,460.84 on the value of the transfers made and threatened to force payment of the same. The donees paid the tax and sued to recover it back. This Court, following *Schwab* v. *Doyle*, 258 U. S. 529, held that the Act of September 8, 1916, should not be construed to have retroactive effect, but also said that if it were so construed it was in violation of the Constitution of the United States and that it would take the property of the plaintiffs without due process of law, in

violation of the Fifth Amendment, and would not be a transfer tax or an indirect tax, but would be a direct tax on the property of the donees in violation of Article 1, Section 9, subdivision 4 of the Constitution, because not laid in proper relation to the census or enumeration as therein provided. That view of the statute there under consideration applies with equal force to the statute here involved.

POINT II.

This court has held that a similar provision in a State statute violates the Fourteenth Amendment, from which it follows that the statute here in question is invalid under the Fifth Amendment.

This court has already decided that a conclusive statutory presumption that all gifts of a material part of a decedent's estate made by him within six years of his death were made in contemplation of death, whereby they became subjected, without regard to his actual intent in making the gifts, to graduated inheritance taxes, creates an arbitrary classification, and conflicts with the Fourteenth Amendment of the Constitution. *Schlesinger* v. *Wisconsin Tax Commission, supra.* This decision is conclusive as to the first question certified, unless it can be distinguished on the ground that the period of time embracing the gifts to which the State sought to apply the presumption was six years, whereas the Federal statute provides for a two-year period, or on the ground that the decision involved a State statute, whereas the case at bar involves a Federal statute.

The language of the majority opinion, however, indicates clearly that the period of time was unimportant. The court cited two reasons for its decision, first, the statutory

classification by which gifts *inter vivos*, within six years of death but in fact made without contemplation thereof, were conclusively presumed to have been so made, while like gifts at other times are not thus treated, and second, the gifts were subject to graduated taxes which could not be properly imposed on all gifts or indeed upon any gift without testamentary character. It is plain that the classification would be no less arbitrary if the time had been two years instead of six years. It is likewise apparent that the duration of the period fixed by the statute had no bearing upon the court's second objection to the statute, that is, that gifts not made in contemplation of death are subjected to taxes which could not properly be imposed upon all gifts or upon any gift without testamentary character.

That was the view adopted by the Court of Appeals of Kentucky in a case involving a similar statute attempting to raise a conclusive presumption with respect to gifts within three years of death. After citing this court's decision in the *Schlesinger* case, the court said that the Kentucky statute must be held unconstitutional on the authority of that case. *State Tax Commission* v. *Robinson, Executor, et al.*, 28 S. W. (2d) 491 (Court of Appeals of Kentucky).

There is no basis for distinguishing the *Schlesinger* case on the ground of substantial difference between the Fourteenth and the Fifth Amendments. The purpose of the Fourteenth Amendment, as stated by this court, is to extend to citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property as is afforded by the Fifth Amendment against similar legislation by Congress. *Tonawanda* v. *Lyon*, 181 U. S. 389, 391. In other cases this court has held

that the Fifth Amendment imposes the same restrictions on the Federal Government that the Fourteenth Amendment places on the States. *Shaffer* v. *Carter*, 252 U. S. 537, 544; *Coolidge* v. *Long*, 252 U. S. 582, 595. The contention that the *Schlesinger* case was distinguishable on this ground was considered by the District and Circuit Courts in cases involving the statute here under consideration and was rejected. *Donnan* v. *Heiner*, 48 Fed. (2d) 1058; *Anderson* v. *Guinzburg* (C. C. A. 2), decided December 7, 1931, to be reported 54 Fed. (2d) 629; see also *American Surety & Trust Co.* v. *Commissioner*, 24 B. T. A. 334.

POINT III.

The rights guaranteed by the Fifth Amendment of the Constitution are superior to the supposed necessity for this legislation.

The second sentence of Section 302 (c) can only be justified, if at all, as a necessary adjunct to the power of Congress to tax gifts in contemplation of death as testamentary dispositions in order to prevent evasion of the tax. But a *bona fide* gift *inter vivos* is not an evasion of the tax and there is no necessity for including such gifts in the classification of testamentary dispositions. Under the regulations made pursuant to law the return of the taxable estate must disclose all transfers other than those made for adequate consideration. The law imposes the duty upon the Commissioner of examining the return and of making such inquiry as may be necessary to enable him to make a determination of the tax liability. When the Commissioner has made his final determination, the burden is then imposed upon the taxpayer, if he petitions the Board of Tax Ap-

peals for a redetermination or resorts to the Courts for recovery of the tax paid, to establish that the determination of the Commissioner is incorrect. If the taxpayer is able by a preponderance of evidence to rebut the *prima facie* presumption of correctness which attaches to the final determination of the Commissioner, there is no justification for denying him the opportunity. It may well be said that issues involving intent and motive are sometimes difficult of ascertainment and proof, but that is no reason for denying the taxpayer his day in court. The difficulty falls upon the taxpayer. The Commissioner has the advantage in that he can make a determination in the matter to which the law attaches a presumption of correctness which can only be overcome by affirmative evidence to the contrary. Of course, such a provision as that here in question simplifies administration of the law, but however desirable it may be to make a tax law self-executing or as nearly so as possible, Congress must stay within constitutional limits. In imposing a tax upon the transfer of property of a decedent, it cannot by a legislative fiat which prohibits inquiry into the real facts bring into the permissible classification transfers which were not in fact testamentary in character. The rights guaranteed to the citizens of this country under the Fifth Amendment are superior to the supposed necessity for such an arbitrary and discriminatory classification. *Schlesinger* v. *Wisconsin Tax Commission, supra; Hoeper* v. *Wisconsin Tax Commission,* 52 S. Ct. 120.

POINT IV.

The statutory provision in question cannot be sustained as a tax on gifts *inter vivos*.

The title of the Revenue Act of 1926, of which the challenged enactment is a part, imposes an estate tax as distinguished from an individual inheritance tax, that is, the tax is imposed on the net estate as an entity and not on the individual shares passing to the beneficiaries. The tax as thus imposed is an excise tax levied upon the transfer of the net estate as defined in the statute. Obviously it is not a gift tax. Under the statute a transfer within the taxable class is to be included in the estate at the value at the date of death, irrespective of the value at the time of the gift. The amount of the tax is not based on the gift itself but on the value of the entire net estate. The tax falls on the interest of the beneficiaries of the estate and not upon the donee, unless the estate is inadequate. This statute will not support a tax as imposed on gifts *inter vivos* only and there is no possible justification for upholding the second sentence of Section 302 (c) as a gift tax.

POINT V.

There is complete unanimity of opinion in the decisions of the lower courts that the enactment in question is unconstitutional.

The first question before the court has been answered in the affirmative by the United States Circuit Court of Appeals for the First and Second Circuits, each of which affirmed decisions of the United States District Courts to

the same effect. In addition to the decision of the court below in the case at bar, the United States District Court for the District of Delaware has likewise held that the second sentence of Section 302 (c) of the Revenue Act of 1926 is unconstitutional and the United States Board of Tax Appeals has reached the same conclusion. In all of the cases thus far arisen, in which the validity of the enactment in question was put in issue, the courts and Board of Tax Appeals reached the unanimous conclusion that the provision is beyond the power of Congress and violates the rights guaranteed to citizens in the Fifth Amendment to the Constitution. *Hall* v. *White,* 53 Fed. (2d) 210 (C. C. A. 1), affirming 48 Fed. (2d) 1060; *Anderson* v. *Harold K. Guinzburg, et al., Executors, supra; Delaware Trust Company* v. *Handy* (D. C. Del.), 51 Fed. (2d) 867, certified to Supreme Court December 3, 1931, Docket No. 546; *American Surety and Trust Co.* v. *Commissioner, supra; Cromwell, et al., Executors* v. *Commissioner,* 24 B. T. A. 461; *Littauer, et al., Executors* v. *Commissioner,* 24 B. T. A. 983.

POINT VI.

Furthermore, the second sentence of Section 302 (c) is void because repugnant to subsequent provisions of the same Act.

Sections 1111, 1113 (a), 1117 and 1122 (c), considered as a whole, provide for a complete system of corrective justice whereby after payment a taxpayer may institute suit and recover taxes illegally collected from him. This system gives a taxpayer his day in court and affords him an opportunity to show that taxes paid by him were illegal

and unlawfully assessed and collected. It gives him the right to a judicial determination of the facts necessary and material to the tax liability. Section 1113 (a), which is a re-enactment of Section 3226, Revised Statutes, does not provide for any exception to the taxpayer's right to a final judicial determination. It is the plain intent of that section that a taxpayer may have his right to recover taxes, which he claims were illegally collected, determined by the judicial department, irrespective of any prior administrative or legislative determination, provided he complies with the prerequisites to institution of his action, such as filing a timely claim for refund and bringing suit within the prescribed time.

Prior to the Revenue Act of 1926, the taxpayer's right to have a judicial determination of a tax controversy involving transfers in contemplation of death was safeguarded by the provisions of the applicable Revenue Laws. These provisions were substantially similar to the first and third sentences of Section 302 (c) of the Revenue Act of 1926. The first sentence provides for inclusion in the taxable estate of gifts made at any time if they were actually made in contemplation of death. The third sentence provides in substance that a transfer made within two years of death without adequate consideration, but prior to the enactment of the Act shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death. The second sentence, however, creates a conclusive presumption with respect to similar transfers made after the enactment of the Act without opportunity to the taxpayer *to show the contrary.* It is a new provision in estate tax legislation and goes far beyond all prior laws. It purports to deny to the taxpayer a fair opportunity to prove the

facts upon which the estate tax liability is predicated and thereby it is repugnant to the subsequent provisions of the statute, under which for over half a century there has been a complete system of corrective justice under which a taxpayer is assured of his day in court. The purpose of the second sentence of Section 302 (c) is just the opposite of Section 1113 (a). The former cannot be reconciled with the latter. If it is impossible to reconcile two provisions enacted at the same time, the last in order of arrangement should prevail. It follows, therefore, that the second sentence of Section 302 (c) is invalid because repugnant to the subsequent provisions of the same Act.

Conclusion.

For the reasons set forth above it is submitted that the first question certified should be answered in the affirmative. If the Court holds otherwise, the second question should be answered in the affirmative.

Respectfully submitted,

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50 Broadway,
New York, N. Y.

February, 1932.

[redacted]

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Section 1131. 21

MISCELLANEOUS.

Treasury Department, Reg. 70 (1929 Ed.), Art. 16... 17

House Report, 69th Congress, 1st Session, Report No. 1, page 15. 19

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 514.

D. B. HEINER, Collector of Internal Revenue, 23rd District of Pennsylvania,

against

JOHN H. DONNAN et al.

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF OF AMICUS CURIAE.

The brevity of the record and the statement of facts by the parties make it unnecessary to set them forth in this brief. They will be adverted to as necessary in the course of the argument.

The *amicus curiae* is the attorney for the taxpayers in the case of **Anderson v. Guinzburg**, No. 689, October Term, 1931, of this Court (51 Fed. [2d] 592; aff'd December 14, 1931, by the United States Circuit Court of Appeals for the Second Circuit *sub nom Guinzburg* v. *Anderson*). A petition for certiorari by the Government is now pending in this Court.

Summary of Argument.

The second sentence of Section 302 (c) of the Revenue Act of 1926 violates the due process clause of the Fifth Amendment and the application of the Revenue Act of 1926 to the gifts made by the decedent to his children violated the due process clause of the Fifth Amendment, because (a) there was no subject matter to be taxed,

(b) the tax was based on an unequal classification, and (c) procedural due process was denied in that the respondents were not permitted to show the true facts.

The Fifth Amendment applies to the taxing power of Congress.

The *Milliken* case and the section dealing with gifts actually made in contemplation of death are irrelevant.

The tax is not a gift tax and if it were it would be unconstitutional in the form in which it is enacted in the second sentence of Section 302 (c) of the Revenue Act of 1926.

POINTS.

I.

The assessment of the Estate Tax upon the gift made by the decedent to his son within two years of death was arbitrary and capricious, and the Revenue Act of 1926 in so far as it required the inclusion of the gift as part of the decedent's taxable estate, deprived the executors and the donee of property without due process of law and is unconstitutional and void.

The Act of Congress in Question.

The Estate Tax was determined pursuant to the provisions of the Revenue Act of February 26, 1926, Title 26, Sections 1091 *et seq.*, of the United States Code (44 Stat. 69).

Section 301 (a) of the Revenue Act of 1926 (U. S. C. A., Sec. 1092) provides that the tax is to be imposed upon the value of the net estate pursuant to the graduated schedule there set forth.

Section 303 of the Revenue Act of 1926, as amended by Section 401 (a) of the Revenue Act of May 29, 1928 (U. S. C. A., Sec. 1095), provides that the net estate shall be determined in the case of residents by deducting certain items there enumerated from the "gross estate." Gross

estate is defined by Section 302 of the Revenue Act of 1926 (U. S. C. A., Sec. 1094) and provides, among other things:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.
>
> * * * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. **Where within two years prior to his death but after February 26, 1926, and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this chapter.** Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to February 26, 1926, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this chapter."

It was under the authority of the second sentence (in black type) in the section just quoted that the Commissioner of Internal Revenue required the gift of the decedent to his children to be returned as a part of the estate (R. 1), and it was under that sentence that the gift was included in the gross estate and the additional assessment was made (R. 1-2).

Substantive Due Process—There Was No Subject Matter to Be Taxed.

It is to be noted that this *gift* was made *taxable* by the statute (a) although it was not a part of the estate, nor as a matter of fact made in contemplation of death; (b) at the value as of the date of death, although this was not necessarily the same value as at the date of receipt; (c) that the amount of the tax on this gift was not determined by the value of the gift itself, but by the amount of the entire net estate; (d) that the tax fell upon the interest of the beneficiaries in the estate and not upon the interest of the donee unless the estate were inadequate to pay the tax (Sec. 314, Revenue Act of 1926; U. S. C. A., Sec. 1114).

This Court has held that the Estate Tax is an excise tax, which attaches to the estate before distribution, on the right to transmit or on the transmission.

New York Trust Co. v. *Eisner*, 256 U. S. 345, 349.
Knowlton v. *Moore*, 178 U. S. 41.

With one exception, which will hereafter be discussed, this Court has always held that an estate tax can only be levied where some economic benefit of property, whether it be physical property itself or a power over property, passes or terminates or ripens by reason of death.

In *Nichols* v. *Coolidge*, 274 U. S. 531, it was held that a transfer made before death which "was in no proper sense testamentary" was not taxable. The gift was absolute, at least as to the property conveyed to the trustees.

In *Tyler* v. *United States*, 281 U. S. 497, it was held that the interest of a survivor in an estate by the entirety was taxable because "death duties rest upon the principle that death is the 'generating source' from which the authority to impose such taxes takes its being, and 'it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties'" (p. 502).

And in the same case the Court said, by Mr. Justice Sutherland, at page 563:

> "The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. **Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death,** rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law." (Black type ours.)

In *Chase National Bank* v. *United States*, 278 U. S. 327, policies on the life of the decedent payable to others were held taxable because the decedent had reserved to himself the right to change the beneficiary. The Court said at page 338, through Mr. Justice Stone:

> "Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax. *Chanler* v. *Kelsey*, 205 U. S. 466. * * * And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death. *Bullen* v. *Wisconsin*, 240 U. S. 625; cf. *United States* v. *Robbins*, 269 U. S. 315, 327; *Cohen* v. *Samuels*, *supra*." (Black type ours.)

Reinecke v. *Northern Trust Co.*, 278 U. S. 339, admirably illustrates the point here made. Two sets of trusts were involved. In the first set the testator in his lifetime conveyed property in trust, the income to be payable to himself and on his death the income to be paid to designated persons until the termination of the trusts, with remainders over. The settler reserved the power to himself alone to revoke the trusts, providing that upon the revocation of the corpus of the trusts must be returned to him. The settler died without having revoked the trusts. They were nevertheless held subject to the transfer tax.

But in the case of five other trusts created by the testator in his lifetime, he reserved the power to "alter, change or modify" each trust only by joint action of himself and the beneficiaries of the respective trusts or a majority of them. The trusts were not in contemplation of death. The Court held that these trusts were not taxable upon the death of the grantor. The reason for this is admirably stated by Mr. Justice Stone, pages 346-347:

> "**The shifting of the economic interest in the trust property which was the subject of the tax** was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax. * * *
>
> In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * It is not a gift tax, and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute." (Black type ours.)

The decision was based on statutory interpretation in order to avoid the necessity of determining at that time whether a tax could constitutionally be levied by the Government on gifts completed by the donor in his lifetime and not made in contemplation of death "where he has retained no such control, possession or enjoyment." The importance of the decision is its emphasis on "the shifting of the economic interest."

Perhaps the most important case to be considered is *Nichols* v. *Coolidge*, 274 U. S. 531. There the grantor made an absolute conveyance, without consideration, of real estate and personal property to trustees, who agreed to pay the income to the settlers and after their death to distribute the corpus among the settlers' five children or their representatives. Subsequently the settlers assigned to their children the entire interest in the property, including the right to income therefrom. This Court held that in so far as Section 402 (c) of the Revenue Act of 1919 (which was similar to the first sentence of Section 302 (c) of the Revenue Act of 1926) required that this property should be included in the gross estate of one of the grantors, it violated the Fifth Amendment. The Court said at page 540:

> "But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. *The mere desire to equalize taxation cannot justify a burden on something not within congressional power.*"

On pages 542 to 543 the Court, while conceding the power of Congress to prevent evasion of taxes, recognized the arbitrary character of a tax the levying of which was dependent upon some future indeterminable occurrence and the amount of which was to be fixed by transfers unrelated in time and character to that upon which the excise was levied. The Court said:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten

dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Frew* v. *Bowers*, 12 Fed. (2d) 625.

This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushhdber* v. *Union Pacific R. R.*, 240 U. S. 1, 24; *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450. See also *Knowlton* v. *Moore*, 178 U. S. 41, 77. And we must conclude that §402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

In *Nichols* v. *Coolidge*, it was really unimportant that the gift had been completed before the passage of the Act. What was of vital consequence was that the gift was complete before death which was the hour on which the tax obligation, whatever it might be, arose and the facts upon which death duties were predicated became crystallized.

Perhaps no case more clearly indicates the principle that an estate tax or inheritance tax is levied upon a change in economic status either by the termination or ripening or passage of a property right than does *Coolidge* v. *Long*, 282 U. S. 582. That case involved the precise trust under consideration in *Nichols* v. *Coolidge*. The tax in question was not, however, a Federal estate tax, but the Massachusetts inheritance tax. In other words, whereas *Nichols* v. *Coolidge* treated the Federal Government's right to tax transfers, *Coolidge* v. *Long* dealt with the right of the State to tax successions and reached the same conclusion as had been come to in the earlier case.

Coolidge v. *Long* is particularly valuable because the principal difference between the majority and minority opinions illustrates that the Court did not question the doctrine that it was the passage of some economic interest

that was the subject matter of the tax, but that the difference in viewpoint was the question of whether there was an actual economic change wrought by the death of the grantor. Thus Mr. Justice Butler, speaking for the majority, said at page 602:

> "The overwhelming weight of authority sustains the conclusion that the succession in the present case was complete when the deed took effect."

Mr. Justice Roberts, speaking for the minority, held that this doctrine was untenable, because, as he said on page 608,

> "It is founded on the premise that the only privilege enjoyed by the holder of a future interest in property is the dry legal abstraction of owning that particular interest—that if it vested years ago, to tax the owner later, on the occasion of his coming into actual possession, control and enjoyment of the property, is in fact to tax him presently for the exercise of a privilege long since enjoyed."

In discussing the *Reinecke* case Mr. Justice Roberts went on to point out (p. 629):

> "Repeatedly throughout the opinion the passage of the control, possession and enjoyment of property is referred to as the touchstone of the incidence of the tax. If that be the test when the privilege of the transferor is under investigation, no reason is apparent why the same yardstick should not be used when we are considering the acquisition of rights by the beneficiary."

See also his discussion of *Saltonstall* v. *Saltonstall*, 276 U. S. 260, at pages 622 to 624.

The general rule illustrated by these authorities applies to this case, because the gifts by the grantor to his children were completed many months before death; the father never had the use or benefit of the property and the children at all times enjoyed the exclusive use and possession of the gifts (R. 1). There was nothing consequently that faded out or passed or fructified as the result of the donor's death.

The unfairness and the inequality of the statute are further evidenced by the fact that the gift is required to be taxed not at the value as of the date when it was made, but at a value which may fortuitously or through the acumen of the donee have been greatly increased. It is not the donee who then bears the burden, but the legatees of the decedent who have no interest in the gift and receive no benefit from its enhancement.

The language of Judge Learned Hand used in another connection in *Frew* v. *Bowers*, 12 Fed. (2d) 625, 630, is pertinent here. He pointed out that retroactive taxes imposed unexpected burdens but are permissible when measured and distributed in accordance with the taxpayer's wealth but where, as under the section there considered (and under the section here considered as well) taxes are distributed in accordance with *another's* wealth, "that is a far more grievous injustice." This thought is the basis of the decision of this Court in *Hoeper* v. *Tax Commission of Wisconsin*, decided at the present term on November 30, 1931.

Substantive Due Process—Unequal Classification.

In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, this Court held a Wisconsin statute which was almost identical with the section of the Act under consideration here to be violative of the Fourteenth Amendment and void. There the statute provided that a tax should be levied on transfers of property by will or in contemplation of death, and that any gift "made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section."*

* The Revenue Act of 1926 was enacted three days *before* the decision in the *Schlesinger* case was handed down. Congress, therefore, did not have in mind any time distinction between the six-year period in the Wisconsin statute and the two-year period in the Federal Act.

This Court said at page 239:

> "The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, **while like gifts at other times are not thus treated.** There is no adequate basis for this distinction." (Black type ours.)*

In that case the Court discountenanced the inequality imposed by the tax because the decedent happened to die at a different time than his neighbor. This coincidence was something unrelated to the main fact of the giving away of substance, with death as the motivating force. Inequality resulted from the taxing in the name of a death tax of one transfer wholly unrelated to death while leaving tax free other transfers *inter vivos* equally unrelated to death.

This inequality is splendidly illustrated by the case of *Guinzburg* v. *Anderson, supra.* There the decedent paid one-half of the purchase price of a house given to his son for a home as a wedding present. The decedent died within two years of the gift and his estate was subjected to tax under the second sentence of Section 302 (c) of the Revenue Act of 1926. At the same time that the decedent paid one-half of this purchase price, his wife contributed an equal amount to the purchase price of the house which was their *joint gift.* The wife not dying within two years her estate is not subject to taxation. The coincidence of death is thus made the sole justification for this discrimination.

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* The *Schlesinger* case was followed by the Supreme Court of Kentucky, which declared a similar Kentucky statute unconstitutional in *State Tax Commission* v. *Robinson's Executors,* 234 Ky. 416, 28 S. W. (2) 491.

Under any canon of equality it is difficult to reconcile taxation which is affixed to the act of one joint actor and which does not obtain with respect to that of the other.

In the case of *Hoeper* v. *Tax Commission of Wisconsin*, decided by this Court November 30, 1931, *Schlesinger* v. *Wisconsin* was cited with approval in the majority opinion of the Court in such a way as to demolish two of the Government's arguments, (a) that separate estates can be combined for the purpose of securing a higher tax, and (b) that a conclusive presumption is lawful where its purpose is to avoid evasions of the taxing statutes. Thus Mr. Justice Roberts said:

> "What Wisconsin has done is to tax as a joint income that which under its law is owned separately and thus to secure a higher tax than would be the sum of the taxes on the separate incomes.
>
> The court below assigned two reasons which it thought removed the constitutional objections to the application of the statute in the instant case. It cited and followed the Income Tax Cases, 148 Wis. 456, where the statute here in question was sustained on the ground that the provisions under attack are necessary to prevent frauds and evasions of the tax by married persons, and stated that the decision of this court in Schlesinger v. Wisconsin, 270 U. S. 230, was not inconsistent with the views expressed by the Supreme Court of Wisconsin in its earlier decision. To this we can not agree. In the Schlesinger case this court held invalid a statute which, for the purposes of inheritance tax, classified all gifts inter vivos, effective within six years of death, as gifts made in contemplation of death. To the argument of the necessity for such classification to prevent frauds and evasions, it was answered:
>
> 'That is to say, "A" may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against "B." Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny

due process of law or the equal protection of the laws for any purpose whatsoever.'

The claimed necessity can not justify the otherwise unconstitutional exaction."

And again, in an earlier part of the opinion, it was said:

"That which is not in fact the taxpayer's income cannot be made such by calling it income. (Compare Nichols v. Coolidge, 274 U. S. 531, 540.)"

Fifth Amendment Applies to Taxing Power of Congress.

In the case now before this Court death put no seal upon the gift by the donor to his children; it relieved the subject of the gift of no burden, for none had been imposed upon it by the donor; it gave to the donees no greater estate, no enjoyment more perfect or precise. The grantor passed no property or interest in the securities at his death. There was no privilege of inheritance which might be assessed. The beneficiaries of the estate upon whom the burden fell had no right of succession in the corpus of the *inter vivos* trust and gift on which an excise could attach. The corpus of the estate received no enrichment. If the value of the property had enhanced fortuitously or by reason of the acts of the donee himself after the date of the gift, the increased value would entail a greater tax burden upon the estate and its beneficiaries; that is, upon persons who had no benefit from the property and no interest in its increase.

To tax the estate, therefore, is so arbitrary and capricious as to amount to confiscation, and is consequently forbidden by the Fifth Amendment.

Nichols v. *Coolidge, supra,* at p. 542.
Tyler v. *United States, supra,* at p. 504.
Brushaber v. *Union Pacific R. R.,* 240 U. S. 1, 24.

It is plain from the cases already cited that there is no distinction to be made between the applicability of the Fifth Amendment to the taxing power of Congress and

that of the Fourteenth Amendment to the taxing power of the States.

The language in *Nichols* v. *Coolidge* at page 542 is final. It was there said:

> "This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, 24; *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450. See also *Knowlton* v. *Moore*, 178 U. S. 41, 77."

The Court recently, in *Tyler* v. *United States, supra,* repeated with approval this application of the Fifth Amendment to the taxing power of Congress, saying:

> "The possibility that a Federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment must be conceded—*Brushaber* v. *Union Pacific Railroad*, 240 U. S. 1, 24, and cases cited; *Nichols* v. *Coolidge*, 274 U. S. 531, 542—." * * * *

It is to be noted that these statements were made apropos the unequal and arbitrary exercise of the taxing power which was the true basis of decision in the *Nichols* and *Tyler* cases, and not in connection with retroactivity as has been contended by the Government.

And in *Saltonstall* v. *Saltonstall, supra,* which arose under the Massachusetts succession tax law, and *Chase National Bank* v. *United States, supra,* arising under the Federal estate tax law, we see a further example of similarity in application of the two amendments.

See also *Frew* v. *Bowers*, 12 Fed. (2d) 625, decided by the Circuit Court of Appeals, Second Circuit.

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* Although the Court had before it the tenancy by the entirety subdivision of Section 302, its language was general and is clearly applicable to the case in hand.

Milliken Case Distinguished.

As we have said, there is one exception to the rule that an Estate Tax can only be imposed upon the passing, termination or ripening of an economic benefit at death. That exception is where a gift has been made in contemplation of death and the tax is imposed for the purpose of preventing an evasion.

Milliken v. *United States,* 283 U. S. 15.

See also *dicta* in *Nichols* v. *Coolidge, supra,* at page 542, and *Tyler* v. *United States, supra,* at page 505.

It is clear from the *Milliken* case that this Court sustained that part of Section 402 (c) in the Act of 1918 which is similar to the first sentence of Section 302 (c) in the Act of 1926, on the ground that although nothing passed at death by the gift itself, it was by nature a testamentary act, the prospect of death being the motivating cause. It treated gifts made in contemplation of death as though they were gifts *causa mortis,* to take effect upon death. **It was the act of the donor himself that related the gift to his death, not Fate or the procession of months and years.** Making the *intention* of the grantor rather than the status or shift of property interests the basis of taxation is an anomaly; and yet **the very act of taxing such gifts made for equality** in the *Milliken* case. Thus Mr. Justice Stone said at page 23:

> "It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such disposition without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. It is thus an enactment in aid

> of, and an integral part of, the legislative scheme of taxation of transfers at death. Decedent's gift as a substitute for a testamentary disposition was thus brought within the operation of the 1916 Act taxing such gifts on the same basis, with respect to rate and valuation, as transfers of property at death. Not only was the decedent left in no uncertainty that the gift he was then making was subject to the provisions of the existing statute, but in view of its well understood purpose he should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation under which substitutes for testamentary gifts were classed and taxed with them."

It is evident, therefore, that the Court regarded the gift, which was truly made in contemplation of death, to be *a substitute for a testamentary gift* the motivation of which was a reasonable apprehension of death, not an apprehension in any vague way as where one thinks "some day I shall die," but that apprehension which is present when one is in the frame of mind to make a will with the desire to settle his temporal affairs.

United States v. *Wells*, 283 U. S. 102.*

The vital distinction between the gift in contemplation of death in which there is a definable relation between death, and the true gift *inter vivos* which properly belongs only in a genuine gift tax, has been succinctly stated by this Court in *United States* v. *Wells*, at page 118:

> "If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which sprang from a different motive. Such transfers were made the subject of a distinct gift tax, since repealed."

* See *United States* v. *Wells*, 283 U. S. 102, defining "transfers in contemplation of death" as those made with a reasonable apprehension of death as the animating cause of the transfer.

Article XVI, Regulation 70, 1929 Edition, relating to Estate Tax, issued by the Treasury Department.*

In the present case the Trial Court has found (R. 2) the allegation of the complaint that the gift was not made in contemplation of death or to take effect at or after death. Neither the *Milliken* case or its reasoning are therefore applicable.

Not only is the *Milliken* case not apposite from the viewpoint of substantive due process, but it is free from objection as to lack of procedural due process, for the estate was given its day in court to contest the fact of contemplation of death.

Procedural Due Process—Denial of Right to Show True Facts.

In the present case the gift was not made in contemplation of death (R. 2). It can in no way be deemed to be an evasion of the Estate Tax. It has not even the color of evasion. To say that a gift was made in contemplation of death, when the contrary was the fact, is on its face arbitrary.† To make it incumbent upon the Commissioner to find a fact contrary to the truth, to say that because a gift is not admitted or shown to have been made, or in fact made, in contemplation of death, it must

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*See Article 16 of Regulations 70 (1929 Edition), Relating to Estate Tax, issued by the Treasury Department, which reads as follows:

> "The words 'in contemplation of death' do not mean, on the one hand, a general expectation of death such as all persons entertain, nor, on the other, is the meaning limited to an expectation of immediate death. A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. Such a transfer is taxable, although the decedent parts absolutely and immediately with his title to and possession and enjoyment of the property."

And see *Milliken* v. *United States, supra,* and *United States* v. *Wells, supra.*

†In the *Guinzburg* case, *supra,* it was conceded that the gift was made as a wedding present to the donor's son, but it was nevertheless taxed as being in contemplation of death.

nevertheless be deemed to have been made in contemplation of death, is to deprive the taxpayers of due process of law.

This is true irrespective of whether there is substantive due process, that is, whether in fact there be (1) subject-matter to be taxed; and (2) equal classification.

A rule of substantive law cannot be adopted to deny taxpayers procedural due process, to deprive them of their day in court.

Manley v. *Georgia*, 279 U. S. 1.
Keller v. *United States*, 213 U. S. 138.
People v. *Mancuso*, 255 N. Y. 463.
Mobile &c. R. R. v. *Turnipseed*, 219 U. S. 35.

The words of Mr. Chief Justice Hughes in *Bailey* v. *Alabama*, 219 U. S. 219, at pages 238 and 239, are particularly relevant:

> "The power to create presumptions is not a means of escape from constitutional restrictions."

This is not the case of Congress providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue; Congress has not attempted to create a true presumption of the intention of the deceased. It has, on the contrary, precluded rebuttal by providing that where the Government fails to make out a *prima facie* case of a gift made in contemplation of death it shall under the circumstances be deemed to have made out an irrefutable case. In other words, it might be a fair presumption, inspired by experience, that unexplained gifts made within two years of death are made in contemplation of death (*Wickwire* v. *Reinecke*, 275 U. S. 101), but to adopt such experience as a rule of substantive law, permitting of no rebuttal to show that such a gift was in fact not made in contemplation of death, is confiscatory. As well say by congressional fiat that the title to the house is not now in the donee but in the Government.

The Court said in *Manley v. Georgia, supra:*

> **"Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."**

That Congress did not intend to place the burden of proof on the taxpayer *but to eliminate the possibility of any proof* is demonstrated by comparing the sentence under consideration with the last sentence of Section 302 (c). That created a true rule as to the burden of proof on gifts *inter vivos* where the donor died before February 26, 1926. Such gifts within two years of death are only to be deemed to have been made in contemplation of death "unless the contrary is shown."*

II.

The tax assessed on the gift by the decedent to his son is not a gift tax, or if a gift tax is not valid as such.

We have shown under Point I that the tax assessed against this estate is not merely a tax included in the Estate Tax Act but is an integral part of the Estate Tax itself. The gift is included in the gross and net estates and the amount of the tax is fixed by the sum total of the net estate of which the value of the gift at the date of death is a component.

If it were a gift tax it would be arbitrary.

(a) The gift made by Mr. Donnan would be taxed because he died within a specified period; but an equal contribution made by another person at the same time and for the identical purpose would not be taxed because the donor survived the two-year period. This situation is splendidly illustrated in the *Guinzburg* case, *supra.*

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* To this effect is the House Report on the proposed Revenue Act of 1926 (69th Congress, 1st Session, Report No. 1, p. 15).

It was attempted to sustain the statute in *Schlesinger* v. *Wisconsin, supra,* by urging that it was a gift tax. The argument was disposed of by this Court as follows:

> "The court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of the opinion that such a classification would be in plain conflict with the Fourteenth Amendment."

(b) Apart from the foregoing vice of arbitrary classification, this, if viewed as a gift tax, would suffer from another violation of substantive due process. The tax here is plainly based upon the value of the property at the death of the donor—at a time when it is concededly the property of the donee. The tax is thus not based upon the value of the gift at all or upon any value that relates to the donor's own substance. It is apparent, therefore, that the tax rests upon an arbitrary basis, for it makes one individual pay for what another has. It must follow, under the authority of the *Hoeper* case, *supra,* that the tax is bad. Indeed, it was this thought which pressed the Supreme Court in *Nichols* v. *Coolidge* to declare the tax there under scrutiny to be arbitrary, and which led Mr. Justice Learned Hand in *Frew* v. *Bowers* to characterize the levy before him as "whimsical" and contrary to the Fifth Amendment. From the earliest day it has been clear that a tax cannot be made the means of putting upon one man the burden that should be borne by another (*United States* v. *B. & O. Railroad Co.,* 17 Wall. 322).

Nor is there any constitutional justification, if this be viewed as a gift tax, for merging the gift under consideration into the mass of the estate of the decedent. How is the estate related to the tax if this be a gift tax pure and simple? The tax is measured upon a basis wholly unconnected with the *inter vivos* distribution of wealth, which is the subject-matter of a gift tax. To bring the estate

into the picture is to do something so entirely unrelated as to make the imposition clearly arbitrary. To measure the burden by the size of the estate is also to do something that has none of the rational attributes of a real gift tax. And on this separate ground, substantive due process would be violated.

(c) It is invalid to tax a gift where the tax cannot be foreseen, where the taxpayer's right to know when and how he becomes liable for taxes has not been observed (*Untermyer* v. *Anderson*, 276 U. S. 440). Consequently a gift tax which becomes operative only upon the happening of an event, viz., death, the time of occurrence of which cannot be fixed or foreseen, must be void.

And it is idle to argue that the taxpayer might have anticipated a tax if he died within the period—for the gift was not made with death in mind. Contemplation of death was not an operative factor by definition. If death had been in his contemplation the tax would have been assessed under the first sentence of Section 302 (c) and the $5,000 deduction provided for in the second sentence of the section would not have been allowed. (See *Schlesinger* v. *Wisconsin*, *supra*, at pages 239, 240.*)

This is sufficient to distinguish the present case from *Phillips* v. *Dime Trust & Safe Deposit Co.*, 284 U. S. 160. There could be no "knowledge available before the creation of the estate that it was embraced within an established taxing system and that its taxation, on the same basis and in the same manner as decedents' estates, was an essential part of the system." At most, the donor would know that it might be so taxed if a certain contingency occurred. This is not sufficient to justify the tax (*Untermyer* v. *Anderson*, *supra*).

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*The gift tax (Chap. 234, §319, 43 Stat. 313; U. S. C. A., Title 26, §1131) was repealed by the Revenue Act of 1926 (Chap. 27, 44 Stat. 125; U. S. C. A., Title 26, §1131) on February 26, 1926. This was three days before the opinion was handed down in the *Schlesinger* case. Congress could, therefore, not have adopted Section 302 (c) with any intention to avoid the unconstitutional features of an estate or inheritance tax by substituting a new gift tax.

Bromley v. *McCaughn*, 280 U. S. 124, is no authority for supporting as a gift tax such a tax as was here assessed. In the first place, there the fact of the levy of a tax was certain at the time of the gift. Secondly, the tax was measured by the value of the property at the time of the gift, at the time of the exercise of an incident of ownership, and not as of a different time. Thirdly, the tax was computed on the basis of the amounts of the gifts themselves, and not by incorporating the subject-matter of the tax with other property or the exercise of dominion over other property (cf. *Hoeper* v. *Tax Commission of Wisconsin, supra*). Finally, the opinion in the *Bromley* case did not purport to deal with the question of arbitrary classification here involved.

Respectfully submitted,

JAMES MARSHALL,
Amicus Curiae.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 514.

D. B. HEINER, Collector of Internal Revenue, Twenty-third District of Pennsylvania, Pittsburgh, Pennsylvania,

vs.

JOHN H. DONNAN, SIDNEY B. DONNAN, ALVAN E. DONNAN and DOROTHY D. WHITWORTH, Executors and Trustees of the Estate of JOHN W. DONNAN, Deceased, of Washington, Pennsylvania.

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

MOTION AND BRIEF OF SAMUEL W. FORDYCE, HENRY J. RICHARDSON AND C. POWELL FORDYCE, AS AMICI CURIAE, AND ON BEHALF OF THE ST. LOUIS UNION TRUST COMPANY AND ANDREW W. JOHNSON, EXECUTORS OF THE ESTATE OF JACKSON JOHNSON, DECEASED.

SAMUEL W. FORDYCE,
HENRY J. RICHARDSON,
C. POWELL FORDYCE,
Amici Curiae.

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IN THE

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D. B. HEINER, Collector of Internal Revenue, Twenty-third District of Pennsylvania, Pittsburgh, Pennsylvania,

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On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

May It Please the Court:

The undersigned, as counsel for the St. Louis Union Trust Company and Andrew W. Johnson, as executors, respectfully move this Honorable Court for leave to file the accompanying brief in this case as amici curiae.

SAMUEL W. FORDYCE,
HENRY J. RICHARDSON,
C. POWELL FORDYCE,
Counsel for the St. Louis Union Trust Company and Andrew W. Johnson, as Executors.

Amici Curiae.

IN THE

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On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF OF AMICI CURIAE.

This brief, by permission of the Court, and with the consent of counsel for the respective parties, is filed by the undersigned as amici curiae, and on behalf of the St. Louis Union Trust Company and Andrew W. Johnson, both of St. Louis, Missouri, as executors under the last will and testament of Jackson Johnson, deceased, and also on behalf of the St. Louis Union Trust Company, as executor of other estates, wherein the questions here presented are involved.

FACTS.

The facts in the case in suit are set out in the opinions of the District Court for the Western District of Pennsylvania. The opinion of said Court on the Collector's statutory demurrer to the executor's statement is reported at 48 Fed. (2d) 1058; and its final opinion, though not officially reported, may be found at No. 1515 Prentice Hall 1931 Federal Tax Service, or par. 9464 Commerce Clearing House 1931 Federal Tax Service, Vol. 313.

Resume of Facts Involved in One of the Cases Represented by the Undersigned.

Jackson Johnson, a resident of St. Louis, Missouri, died on January 23, 1929. In his last will he named the St. Louis Union Trust Company and Andrew W. Johnson as executors thereof. After the effective date of the Revenue Act of 1926, viz., February 26, 1926, and within two years of his death, the decedent made gifts of property valued at approximately $1,268,281.37. The Commissioner of Internal Revenue has admitted that none of these gifts were actually made in contemplation of death, but asserts that they are made taxable by the conclusive presumption in the second sentence in Section 302 (c) of the Revenue Act of 1926. The executors have paid the tax based on said gifts, and have filed a claim for refund thereof. The action to be taken upon this claim will depend upon the decision of this Court in the case at bar. The executors, there-

fore, have a direct and substantial pecuniary interest in the questions presented in this case.

ISSUES.

The issues involved in this case are presented in the following two questions, certified by the United States Circuit Court of Appeals for the Third Circuit:

(1) Does the second sentence of Section 302 (c) of the Revenue Act of 1926 violate the due process clause of the Fifth Amendment to the Constitution of the United States?

(2) If the answer to the first question be in the negative, is the second sentence of Section 302 (c) of the Revenue Act of 1926 void because repugnant to sections 1111, 1113 (a), 1117 and 1122 (c) of the same act?

This brief is addressed only to the first question.

SUMMARY OF ARGUMENT.

The second sentence of Section 302 (c) of the Revenue Act of 1926 establishes a conclusive presumption that all gifts over $5,000, made after February 26, 1926, and within two years of death, are in contemplation of death.

In U. S. v. Wells, this Court has recently said that the dominative motive and impelling cause of such gifts must be the thought of death.

Construing section 302 (c) and U. S. v. Wells together, it is apparent that the tax imposed by said section has no regard for actualities, and that, as applies to cases where gifts were made without such motive, it is based upon a pure figment of Congressional imagination.

The constitutional issues here involved have been indirectly passed upon by this Court in Schlesinger v. Wisconsin, and by the Supreme Courts of Kentucky and Louisiana. They have been directly passed upon by two Circuit Courts of Appeal, four District Courts, and the Board of Tax Appeals. In all such cases conclusive presumptions of contemplation of death have been held unconstitutional. Such cases should be conclusive.

The Collector denies the applicability of Schlesinger v. Wisconsin, and declares that the presumption in section 302 (c) is a rule of substantive law. Considered as establishing such a rule, this section is unconstitutional for the following reasons:

(1) Congress has no power to disregard the element of "contemplation of death" in levying estate taxes. Such taxes cannot be rested upon anything except testamentary dispositions and substitutes therefor. The tax embraced in section 302 (c) cannot be justified upon any theory of inheritance or estate taxation heretofore sanctioned by this Court.

(2) This section establishes an arbitrary, whimsical, burdensome and unreasonable classification, which is contrary to experience and is contrary to due process of law.

(3) By measuring the tax on an estate by the property of another person, this section violates fundamental principles upon which our Government, and all free governments, are based, and results in such a flagrant inequality between the burdens imposed and benefits received that it constitutes a taking of private property for public use without just compensation — amounts to extortion and spoliation under the guise of taxation.

Nor can this conclusive presumption be justified upon the theory that the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secure. This theory is properly applicable to police power cases where no effort is made to equalize public burdens—to strictly regulatory and not to revenue measures. This Court has refused to apply it in matters of taxation except where it was necessary to reach substitutes for testamentary dispositions which

constitute evasion of estate taxes. The limitations upon the use of that theory given by Mr. Justice Hughes prevent its application in the case at bar. Moreover, its application is not necessary to prevent evasion of estate taxes. Over a billion dollars have been collected with the aid of the prima facie presumption. Congress can pass another gift tax. Furthermore, if taxation of gifts is a necessary public burden to prevent tax evasion, then fairness demands that all who make gifts equally share that burden. Such a burden should not be cast entirely upon those who, regardless of their age, health or actual motive, chance to die within two years after their gift.

If section 302 (c) does not establish a rule of substantive law, it must establish a rule of conclusive evidence. Viewed as a rule of conclusive evidence, it is unconstitutional because it constitutes an invasion of the exclusive and indestructible province of the judiciary to determine the existence and truth of facts in issue; because it deprives the individual of his right to be heard and present his defense, and thus deprives him of the most fundamental requirement of due process of law; and because it is an irrational and arbitrary legislative fiat which this Court has said cannot take the place of facts in matters involving property rights.

Presumptions are indulged to supply the place of facts, and should not be allowed against clearly ascertained and established facts. When facts appear, presumptions should disappear.

Congress cannot pass conclusive rules of evidence, and cannot use them as a means of indirectly violating constitutional restrictions. It cannot make any process "due process" by its mere will. It cannot make constitutional guaranties yield to mere convenience.

The Fifth Amendment should be liberally construed and rigidly enforced to prevent the invasion of the private rights of the individual by section 302 (c). To uphold the constitutionality of that section is to leave Congress subject to no effective restraint, and to make the Fifth Amendment a rope of sand. Private property should be held sacred.

For these reasons, the answer to the first question should be: "Yes."

ARGUMENT.

The second sentence of Section 302 (c), of the Revenue Act of 1926, violates the due-process clause of the Fifth Amendment of the Constitution of the United States.

Section 302 of the Revenue Act of 1926 (26 U. S. C. A. 1094, Feb. 26, 1926, c. 27, s. 302, 44 Stat. 70) provides that the value of the gross estate of a decedent shall be determined by including the value of all property, real or personal, tangible or intangible. Paragraph (c) of this section reads as follows:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. **Where within two years prior to his death but after February 26, 1926, and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000.00, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning**

of this chapter. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to February 26, 1926, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this chapter."

In United States v. Wells, 283 U. S. 102, Chief Justice Hughes, in defining the phrase, "in contemplation of death," said that the differentiating factor between a gift made in contemplation of death and the ordinary gift inter vivos must be found in the transferor's motive. Furthermore, he said that for the gift to fall in the former class, the controlling and dominative motive, which was the inducing and impelling cause of the transfer, must be the thought of death—must be of the sort which leads to testamentary dispositions—and must be for purposes associated with death rather than life.

By the second sentence of Section 302 (c) Congress declared that, if one made a gift after February 26, 1926, and the wheels of fortune ordained that he die within two years thereafter, then, regardless of his actual motive, or his age, health, or cause of his death, whether natural and expected, or accidental and unexpected, the dominative motive which impelled him to make the gift should be deemed and held to be the thought of death. This attempt to establish one's motive by legislation—to base

taxes upon pure figments of the congressional imagination —is startling to say the least.

The first question certified to this Court is: Does the second sentence of Section 302 (c), of the Revenue Act of 1926, violate the due-process clause of the Fifth Amendment to the Constitution of the United States?

We respectfully submit that this question should be answered in the affirmative.

The constitutional issues here involved were directly passed upon by this Court in the case of Schlessinger v. Wisconsin, 270 U. S. 230, which was decided on March 1, 1926, or three days after the effective date of the Revenue Act of 1926. In that case this Court held that the conclusive six-year presumption contained in the Wisconsin Inheritance Tax Act (Section 1087-1 [3], ch. 64 ff. Wisc. Stat. 1919) was a violation of the due process and equal protection clauses of the Fourteenth Amendment. The opinion of the Court was given by Mr. Justice McReynolds, who, in part, said (at pages 239 and 240):

> "The court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have

been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction.

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the Legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against 'B.' Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.

"* * * A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid. Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43, 55 L. Ed. 78, 80, 32 L. R. A. (n. s.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243, discusses the doctrine of presumption."

Mr. Justice Holmes dissented, saying (at page 241):

"Of course many gifts will be hit by the tax that were made with no contemplation of death. But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured. A typical instance is the prohibition of the sale of unintoxicating malt liquors in

> order to make effective a prohibition of the sale of beer. The power 'is not to be denied simply because some innocent articles or transactions may be found within the prescribed class.' Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 201, 204 * * *."

For convenience, this theory of Mr. Justice Holmes will be hereinafter referred to as the "penumbra theory."

We contend that this language effectively and succintly answers all of the arguments which can be made in favor of a negative answer to the first question certified. Were it not for the fact that the present case involves a two, instead of a six, year conclusive presumption, and involves the Fifth, instead of the Fourteenth, Amendment, nothing more would need to be said. These distinguishing features, however, are stressed by the collector, who denies that the Schlesinger case is controlling. In this opinion he is at variance with the Circuit Courts of Appeal of the First and Second Circuits, five District Courts and the Board of Tax Appeals.

The cases in which the second sentence of section 302 (c) has been held a violation of the Fifth Amendment are: The case at bar; Hall v. White, 48 Fed. (2d) 1060, April 6, 1931, Morton, District Judge, on demurrer, affirmed White v. Hall, 53 Fed. (2d), Advance Sheets, p. 210, Circuit Court of Appeals, First Circuit, before Bingham and Wilson, Circuit Judges, and Morris, District Judge, November 3, 1931, Supreme Court Docket No. 636; Guiltz-

burg v. Anderson, 51 Fed. (2d) 592, Coxe, District Judge, July 28, 1931, on motion to dismiss complaint for insufficiency in law, affirmed by the Circuit Court of Appeals for the Second Circuit on December 7, 1931, opinion reported at paragraph 9670, volume 313, Commerce Clearing House Federal Tax Service 1931, before Hand, Swan and Chase, Circuit Judges, Supreme Court Docket 689; Delaware Trust Co. v. Handy, 51 Fed. (2d) 867, August 28, 1931, on special demurrer, Nields, District Judge, on merits, 53 Fed. (2d), Advance Sheets, p. 1042, Supreme Court Docket 546; see Mather v. McLaughlin, December 17, 1931, District Court Ohio, Dickinson, District Judge, not yet reported, except at paragraph 9023, volume 323, Commerce Clearing House Federal Tax Service for 1932; American Security and Trust Co., Executors Lincoln Estate, v. Commissioner, 24 B. T. A. 334, October 16, 1931; Cromwell v. Commissioner, 24 B. T. A. 461, October 26, 1931; and Littauer v. Commissioner, 24 B. T. A. 983, November 27, 1931, Division Report, reviewed by full Board and affirmed on December 31, 1931, 25 B. T. A. ... (Commerce Clearing House Board Dec. No. 7354), in which the Government conceded the unconstitutionality of section 302 (c). See also Uihlein v. Wisconsin, 273 U. S. 642; State Tax Commission v. Robinson's Executors, 28 S. W. (2d) 491, Ky. Court of Appeals, May 20, 1930 (three-year conclusive presumption held unconstitutional); and Succession of Williams, 129 So. 801, 171 La. 151, Supreme Court of Louisiana, June 2, 1930—in all of which the courts fol-

lowed the Schlesinger case in regard to the state inheritance tax acts there involved.

The cases mentioned just above are all based primarily upon the Schlesinger case. The **express** legal propositions for which they stand may be summarized as follows:

(1) That the Schlesinger case cannot be distinguished on the ground that the Wisconsin statute provided for a six, instead of a two, year conclusive presumption [Donnan v. Heiner, 48 Fed. (2d) 1058; Hall v. White, 48 Fed. (2d) 1060; Guinzburg v. Anderson, 51 Fed. (2d) 592; Guinzburg v. Anderson (C. C. A.), 313 C. C. H., par. 9670; American Security & Trust Co. v. Commissioner, 24 B. T. A. 334; and see State Tax Commission v. Robinson's Executors, supra].

(2) That the Schlesinger case cannot be distinguished because the Fourteenth Amendment was involved instead of the Fifth [Donnan v. Heiner, 48 Fed. (2d) 1058; Guinzburg v. Anderson, 51 Fed. (2d) 592, and American Security & Trust Co. v. Commissioner, supra].

(3) That the Schlesinger case cannot be distinguished because the Wisconsin statute provided for an inheritance tax instead of an estate tax [American Security & Trust Co. v. Commissioner, supra; and see also New York Trust Co. v. Eisner, 256 U. S. 345, at pp. 348, 349].

(4) That the Revenue Act of 1926 is more arbitrary than the Wisconsin act involved in the Schlesinger case, be-

cause the former provides for a shorter period and applies to only a part of the gifts inter vivos [American Security & Trust Co. v. Commissioner, supra].

(5) That it is arbitrary and unreasonable to tax an estate or person on a state of facts which do not exist, and which the estate or person taxed is not permitted to show do not exist [Hall v. White, 48 Fed. (2d) 1060].

(6) That mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property [Hall v. White, 48 Fed. (2d) 1060, quoting from Manley v. Georgia, 279 U. S. 1, at p. 6; and see Hall v. White, 53 Fed. (2d), Advance Sheets 210, C. C. A.].

(7) That the second sentence in section 302 (c) establishes a two-year conclusive presumption, which amounts to the legislation of the donor's motive, to the fixing of a fact by legislative fiat, and is a denial of due process of law [American Security & Trust Co. v. Commissioner, supra].

(8) That the interest of the decedent is not subject to the Federal Estate Tax when death plays no part in the transfer [Guinzburg v. Anderson, 51 F. (2d) 592; American Security & Trust Co. v. Commissioner, supra] and see also May v. Heiner, 281 U. S. 238, at page 243; and Bradley v. Nichols, 13 Fed. (2d) 857, at page 859, affirmed 27 Fed. (2d) 47, in which latter case the Court said:

> "The United States has no power to tax gifts inter vivos, except to the extent that they are so related

to the death of the donor as to constitute in fact anticipated succession to his property. * * * To say that property which has been completely given away, and upon the disposition of which the donor's death has no effect, is still a part of the donor's estate, is to say something which is simply not true."

(9) That the tax cannot be sustained as an inter vivos gift tax under the authority of Bromley v. McCaughn, 280 U. S. 124 [Guinzburg v. Anderson, 51 F. (2d) 592; American Security & Trust Co. v. Commissioner, supra; and see also Reinecke v. Northern Trust Co., 278 U. S. 339, at page 347; and Y. M. C. A. v. Davis, 264 U. S. 47].

(10) That if the controlling motive for the gift is not the thought of death, the Revenue Act of 1926 does not embrace it [Guinzburg v. Anderson, 51 Fed. (2d) 592; and American Security and Trust Co. v. Commissioner, supra].

(11) That the tax on gifts not actually made in contemplation of death cannot be sustained as a necessary adjunct of the taxing power in order to prevent tax evasion [Guinzburg v. Anderson, 51 F. (2d) 592].

(12) That the revenue which the Revenue Act of 1926 is designed to produce is safeguarded by virtue of the rule which makes the determination of the Commissioner, that a gift was made in contemplation of death, prima facie correct [American Security & Trust Co. v. Commissioner, supra].

On page 16 of his brief the Collector states:

> "Considered as creating a conclusive presumption, the statute establishes a rule of substantive law and not a mere rule of evidence."

In making this statement the Collector apparently adopts the theory of Professor Wigmore, set forth in his work on Evidence (Second Edition, Vol. 5, Sec. 2492, p. 453) wherein it is said:

> "In strictness, there cannot be such a thing as a 'conclusive presumption.' Whenever from one fact another is conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule really provides that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case. And to provide this is to make a rule of substantive law. * * *"

See also Chamberlayne "The Modern Law of Evidence," Vol. 2, page 1445, Sec. 1160.

To consider Section 302 (c) as establishing a rule of substantive law, we must say that Congress really declared that when an inter vivos gift and death within two years thereafter are shown, then the existence of the element of contemplation of death is wholly immaterial. Stated conversely, we must say that Congress declared that a gift within two years of death, in and of itself, and by virtue

of its own force, is conclusive. Such action by Congress would seem not to be an infringement upon the exclusive prerogative of the judiciary to determine the truth of a fact in issue, for the fact of contemplation of death is not in issue (see Wigmore on Evidence, [2d Edition] Vol. 2, Sec. 1353, pp. 1055, 1056).

However, even assuming for the sake of argument that this section creates a rule of substantive law, we contend that it is unconstitutional because Congress has no power to levy an estate tax upon the excess over $5,000.00 of gifts made within two years of death, but not made in contemplation thereof. Congress cannot declare unnecessary what the Constitution makes necessary.

While recognizing that names do not control Congress, we think that this conclusion is indicated by the fact that such taxation cannot be brought within any definition of estate or inheritance taxation adopted by this Court. The generating source of this tax is not death, but a gift, and death within two years thereafter; it is not rested on the power to transmit or the transmission of property as a result of death, for title to the gift necessarily vests before death. (See Knowlton v. Moore, 178 U. S. 41, at pages 47, 56, 57.) At the death of Mr. Donnan there was no completion of that shifting of the economic benefits of the property transferred which was described as the real subject of the tax in Chase National Bank v. U. S., 278 U. S. 327, at page 338; Reinecke v. Northern Trust Co., 278 U. S. 339, at page 346, and Saltonstall v. Saltonstall, 276 U. S. 260,

at page 271. At that time the gift was not incomplete; no power had been reserved over the use and economic enjoyment of the property, which was then terminated. The transfer here involved was not testamentary in character, was lawful when made, and was then beyond recall, even for the purpose of paying the tax. (See May v. Heiner, 281 U. S. 238, at page 243, and Nichols v. Coolidge, 274 U. S. 531, at page 542.) No interest of his in these gifts ceased by reason of his death. (See Y. M. C. A. v. Davis, 264 U. S. 47, at page 50.) Furthermore, the death of Mr. Donnan was not the generating source of any accessions to the property rights of his donees, and did not bring into being, enlarge or ripen any property rights for those who survived him, of such a character as to make appropriate the imposition of a tax upon that result, within the meaning of Tyler v. U. S., 281 U. S. 497, at pages 502, 504. The actual results brought about by his death to the recipients of his gifts inter vivos was—nothing. Death was not an indispensable event, so far as their full enjoyment of the property was concerned. (See Klein v. U. S., 283 U. S. 230, at page 234.) For these reasons, if the two-year conclusive presumption in section 302 (c) is to be justified, it must be upon some theory other than those which have heretofore been sanctioned by this Court.

Moreover, even considered as a rule of substantive law, this conclusive presumption is a violation of due process of law because based upon an arbitrary, whimsical and burdensome classification which has no regard for actuali-

ties. All gifts over $5,000, and within two years prior to death, are classed together as having been caused by the thought of death—by purposes associated with death instead of life. This classification might be reasonable in the case of a man of the age of 71, who, according to mortality tables, might be expected to die in two years. (See American-Canadian Mortality Investigation 1900-1915, p. 53). Moreover, it might be reasonable as to one in poor health. However, it certainly is not reasonable where a young and healthy person is concerned, as is shown in the case of Mercantile-Commerce Bank & Trust Co. and Malvern B. Clopton, Executors of the Estate of James Theodore Walker, Deceased, Petitioners, v. Commissioner of Internal Revenue, Respondent, Docket No. 45,121, which is now awaiting trial before the Board of Tax Appeals. In that case Walker made a transfer of $500,000 in trust to pay the income thereof to his stepfather for life. At that time Walker had just attained the age of 21 and was in perfect health. Two weeks later he happened to be killed in an airplane accident. Nothing could be more arbitrary and whimsical than to attribute to him, who under mortality tables had a life expectancy of approximately forty-five years (see American-Canadian Mortality Investigation 1900-1915, p. 53), the thought of death as the dominative motive and impelling cause of this transfer. In fact, it was made because of his great wealth and his love for his stepfather. The fact that anyone will die within two

years from a given event is pure chance. When one makes a gift he cannot foresee the date of his death. So far as he can know, his gift is not in contemplation of death, is lawful, and is no evasion of estate taxes. Whether the transfer will ever be taxed is, as Judge Hand said, in his concurring opinion in Frew v. Bowers, 12 F. (2d) 625, at page 630:

> "* * * is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

Thus also in Blodgett v. Holden, 275 U. S. 142, at page 147, it was said:

> "It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequences, made absolute dispositions of his property by gifts should thereafter be required to pay a charge for so doing."

There must be a reason for classification as distinguished from mere accident.

The accident of death within two years after a gift does not ipso facto confer that testamentary character upon it which is necessary to make it the subject of an estate tax. In this connection the language of this Court in Nichols v. Coolidge, 274 U. S. 531, at page 542, is pertinent:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estate must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. (See Frew v. Bowers [C. C. A. 2d], 12 F. [2d] 625.)"

The classification in section 302 (c) is as arbitrary as one lumping together all gifts made within two years of marriage or any other event. It is wholly illusory. And, finally, it is not according to any reasonable practice rule drawn from experience (1 Cooley on Taxation, 4th Ed., p. 717), but rather is contrary to the experience gained by the Government in the cases under all Federal Estate Tax Acts from 1916 to the 1926 Act. (See cases cited in footnote 1,

p. 11 of Collector's Brief, in which the Government, though aided by a prima facie presumption, failed to establish that the gifts were actually made in contemplation of death.) Arbitrary selection can never be justified by calling it classification (Gulf, etc., Rr. Co. v. Ellis, 165 U. S. 150, at p. 159).

But even though the classification in Section 302 (c) could be defended upon the grounds urged by the Collector, that section is unconstitutional because it violates the fundamental principles upon which our Government, and all free governments, are based. Thus in Knowlton v. Moore, 178 U. S. 41, at page 77, it was said:

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of property of another, thus bringing about * * * profound equality * * *, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

Again, in Hoeper v. Tax Commission of Wisconsin, 76 L. Ed. Advance Sheets, No. 4, p. 145, at p. 147, Justice Roberts said:

> "We have no doubt that, because of fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's prop-

erty or income by reference to the property or income of another is contrary to due process of law. * * * That which is not, in fact, the taxpayer's income cannot be made such by calling it income."

So also, in Frew v. Bowers, 12 Fed. (2d) 625, at pages 628-629, Judge Hough said:

"But, if the technical construction is wrong, then we must face the question whether it is within the power of Congress to do what has been done, i. e., use the property of A as a measure for the tax to be laid upon B. Thus stated, it would seem impossible to support the tax; attack must be on the form of statement. We have at great length examined the assemblage of phenomena that make up this case, in order to ascertain what they amount to; and we think the foregoing an accurate statement of what the tax at bar really is.

"If that description be accepted, while there is no classification of taxpayers, the tax itself is 'arbitrary and capricious' (Barclay v. Edwards, 267 U. S. 442, 450, 45 S. Ct. 135, 348 [69 L. Ed. 703]). Further, a tax on a transfer by A, but measured by anything other than the estate of A, may be a duty or excise in form, but it is a palpable effort to tax something other than the transfer. In this case the effort is to tax in 1922 in respect of something untaxable in 1910 (Cf. Lewellyn v. Frick, 268 U. S. 238, at 251, 45 S. Ct. 487, 69 L. Ed. 934). **We think this is an effort to use a constitutional power as a hook on which to hang a cloak that conceals unconstitutional action.**"

To measure the tax upon one person by property owned by another, and not given to such other as a substitute for a testamentary disposition in order to evade lawful taxes, results in such flagrant and palpable inequality between the burdens imposed and the benefits received that it necessarily implies a taking of private property for public use without just compensation, and amounts to extortion and spoliation under the guise of taxation. (See Dane v. Jackson, 256 U. S. 589, at p. 599; and Henderson Bridge Co. v. Henderson, 173 U. S. 592, at p. 614.)

In spite of these considerations, the Collector seeks to justify the two-year conclusive presumption as a rule of substantive law by stating that the penumbra theory (see dissent of Mr. Justice Holmes, in the Schlesinger case, supra) must be applied to prevent wholesale evasion of estate taxes. But can that theory, which is drawn from the law of police power, where no attempt is made to equalize governmental burdens, be applied to the case at bar? This Court, in the Schlesinger case, refused to permit it, saying (270 U. S., at p. 240) that rights guaranteed by the Constitution are not to be so lightly treated—are superior to this supposed necessity—and that a forbidden tax cannot be enforced in order to facilitate the collection of one properly laid. Its application was again denied in Untermyer v. Anderson, 276 U. S. 440 (see p. 451). So also this Court rejected this penumbra theory, in Hoeper v. Tax Commission of Wisconsin, 76 L. Ed. Advance Sheets No. 4, p. 145, at p. 148, in which Mr. Justice

Roberts, in speaking of the Wisconsin Income Tax Act, said:

> "Again, it is clear that the law is a **revenue measure**, and not one imposing regulatory taxes. • • • The present case does not fall within the principle that, where the Legislature, in prohibiting a traffic or transaction as being against the policy of a state, makes a classification reasonable in itself, its power so to do is not to be denied simply because some innocent articles come within the proscribed class (Purity Extract Co. v. Lynch, 226 U. S. 192, 204, 57 L. Ed. 184, 188, 33 S. Ct. 44). **Taxing one person for the property of another is a different matter.**"

See also Weaver v. Palmer Bros., 270 U. S. 402, at page 415, in which the Court said: "The constitutional guaranties may not be made to yield to mere convenience."

Nevertheless, the theory was used in Milliken v. U. S., 283 U. S. 15, at pages 24 and 25, in which this Court held constitutional the taxation of gifts actually made in contemplation of death, because such gifts **were substitutes for testamentary disposition.** However, the gifts in the case at bar have been found by the Court not to be substitutes for such dispositions—not to be an attempt to evade estate taxation. Consequently, for the penumbra theory to be applied in this case a much stronger justification for the violation of constitutional rights of the individual must be discovered.

The limitation upon the use of the penumbra theory

in police power cases was expressed by Mr. Justice Hughes in Purity Extract Co. v. Lynch, 226 U. S. 192, at page 204, when he stated that said theory would not be followed unless a contrary conclusion would save the nominal power while preventing its effective exercise, and that "the inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." Even assuming that this theory can be freely applied in tax cases, it is obvious that a contrary conclusion, viz., that gifts within two years of death shall not be deemed and held to have been made in contemplation of death, would not preserve merely the nominal power of federal estate taxation while preventing its effective exercise. Such a conclusion would leave in force the prima facie presumption with the aid of which the Treasury Department has been able during the period of 1917-1928 to collect $1,140,218,964.29 in estate taxes (Vol. 322, Estate Tax, C. C. H. Federal Tax Service, pp. 3013 and 3014). If such a sum of money can be collected without a conclusive presumption, there would seem to be no justification for fear of wholesale tax evasion if it were held unconstitutional. Moreover, since the gift tax was held constitutional in Bromley v. McCaughn, 280 U. S. 124, a doubtful point before that decision, there is no reason why Congress cannot preserve the revenue by the passage of another gift-tax act. If taxation of inter vivos gifts is a necessary public burden to prevent evasion of estate taxes, then all those who

make such gifts should equally share this burden. It is unfair to take only the property of those who chance to die within two years after their gifts for this public use. It is apparent, therefore, that the second sentence of section 302 (c) is merely an arbitrary legislative fiat.

For the above reasons, we respectfully contend that the two-year conclusive presumption in section 302 (c) cannot be held constitutional as a substantive rule of law. The conclusive presumption cases cited by the Collector are not contrary to this conclusion, for they involved rules of substantive law which Congress had constitutional power to make. The situation in the case at bar is different. And if it is not such a rule, then it must be a rule of conclusive evidence. So considered, is it constitutional? We think not.

Considering the two-year presumption in section 302 (c) as a rule of conclusive evidence, it must be held unconstitutional because it is an invasion by the Legislature of the exclusive prerogative of the judiciary to determine the truth of facts in issue. Thus, in Wigmore on Evidence, 2d Ed., Vol. 2, p. 1057, it is said:

> "The judicial function under the Constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of the facts; to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the

exercise of an indestructible judicial function. To make a rule of conclusive evidence compulsory upon the judiciary, is to attempt an infringement on their exclusive province."

Furthermore, such presumption, so considered, is unconstitutional because, by preventing the disclosure of actual facts, it prevents one from being heard before he is condemned. The fundamental requirement of due process of law is an opportunity for a hearing and defense (Ballard v. Hunter, 204 U. S. 241, at page 255; Pittsburgh etc. R. R. Co. v. Backus, 154 U. S. 421, at page 426; Holden v. Hardy, 169 U. S. 366, at page 389, 390; and see Hoover v. McChesney, 81 F. 472, at page 481, quoting language of Mr. Webster in Dartmouth College v. Woodward, 4 Wheat. 518). Even prima facie presumptions are not allowed which directly or indirectly violate this requirement. (See Bailey v. Alabama, 219 U. S. 219, at page 239; Manley v. Ga., 279 U. S. 1, at page 6, and Bandini Petroleum Co. v. Superior Court, 76 L. Ed. Advance Sheets, page 123, at page 129, Nov. 23, 1931.) The essential facts which are constitutionally required for a "taking by due process of law" cannot be abolished by Congress. It is not within the power of any American legislature to deprive one of his property by making his adversary's claim to it conclusive of its own validity (Marx. v. Hanthorn, 148 U. S. 172, at pages 182, 183).

Moreover, this presumption, when considered as a rule of conclusive evidence, is unconstitutional for other reasons. Although the law of evidence is a creature of experience, this rule is not drawn from, but is contrary to, actual experience. "Presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them" (Fresh v. Gilson, 16 Pet. 327, at p. 331). As shown above, there is no rational connection between a gift and death within two years thereafter, the facts proved, and contemplation of death, the fact presumed. The inference of the latter fact from the former is unreasonable, irrational and purely arbitrary. It amounts to a legislative fiat, which takes the place of fact in a matter involving property rights, and as such has been condemned by this Court on numerous occasions. (See Manley v. Ga., 279 U. S. 16, at pages 6 and 7, and cases therein cited.)

As said in Lincoln v. French, 16 Otto (105 U. S.) 614, at p. 617:

> "But all presumptions as to matters of fact, capable of ocular or tangible proof, * * * are in their nature disputable. No conclusive character attaches to them. They may always be rebutted and overthrown. * * * Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear presumptions disappear."

Nor is Rhode Island v. Palmer (National Prohibition Cases), 253 U. S. 350, 387-388, cited by the Collector on pages 19 and 42 of his brief, contrary to this statement. In regard to that case the Supreme Court of Florida, in Atlantic Coast Line R. R. Co. v. Gainsville, 83 Fla. 275, 91 So. 118, said:

> "It is no authority for the proposition that legislative bodies have power with regard to all physical facts to declare a thing to be so which is not so. Another authority counsel might have cited, but did not, is that of the monk Gorenflot, who, at the instance of Chicot, the jester, solemnly christened a chicken a carp in order that he might partake of it on Friday without violating his religious obligations."

The christening by Congress of all gifts over $5,000 within two years of death as being in contemplation thereof does not change the state of mind of the donor, does not convert truth into falsehood, and does not give such gifts the testamentary character necessary for federal estate taxation. It is merely an effort to use a constitutional power as a hook on which to hang a cloak that conceals unconstitutional action.

The Legislature cannot pass conclusive rules of evidence. Its power over such rules is a power to shape and mould, for the purposes of justice, the rules under which parties are to make a showing of their rights, and not a power to preclude their showing them (Cooley on Taxation, 4th Ed., Vol. 4, pages 3150 and 3151).

A constitutional prohibition against taxation of gifts within two years of death, not testamentary in character, cannot be transgressed, indirectly by the creation of statutory presumptions any more than it can be violated by direct enactment. The power to create presumptions is not a means to escape from constitutional restrictions (Mr. Justice Hughes in Bailey v. Ala., 219 U. S. 219, at page 239, and Macallen v. Commonwealth of Mass., 279 U. S. 620, at p. 629). Congress cannot be left free to make any "due process" by its mere will (Murray v. Hoboken Land Co., 18 How. 272, at page 276).

Conclusion.

In conclusion, we wish to call attention to the remarks made by this Court in Gulf, etc., Ry Co. v. Ellis, 165 U. S. 150, at page 154 (Mr. Justice Brewer), and in Wilkinson v. Leland, 2 Peters 625, at page 657 (Mr. Justice Story). In the former case it was said:

> "'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to

be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be obsta principiis.'

"While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."

And in the latter case it was said:

"That government can scarcely be deemed free where the rights of property are left solely dependent upon the will of a legislative body without restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred."

If this conclusive presumption in Section 302 (c) is held constitutional, then no effective restraint against arbitrary action of Congress can be found in the Fifth Amendment. Conclusive presumptions can be made in every field of legislation. To permit this encroachment upon the private right of individuals is to make that amendment nothing more than a rope of sand.

For the above reasons, we respectfully submit that the answer to the first question certified to this Court by the

Circuit Court of Appeals for the Third Circuit must be: "Yes."

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Supreme Court of the United States

October Term—1931

No. 514

D. B. HEINER, *Collector of Internal Revenue, 23rd District of Pennsylvania,*

v.

JOHN H. DONNAN, SIDNEY B. DONNAN, ALVAN E. DONNAN, *et al.*

Motion of Continental Illinois Bank & Trust Company, as Executor of the Estate of John J. Mitchell, Deceased, et al, For Leave to File Brief as Amici Curiae, and Brief of Amici Curiae.

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Supreme Court of the United States

October Term—1931

No. 514

D. B. HEINER, *Collector of Internal Revenue, 23rd District of Pennsylvania,*

v.

JOHN H. DONNAN, SIDNEY B. DONNAN, ALVAN E. DONNAN, *et al.*

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

May it please the Court:

The undersigned, as counsel for

Continental Illinois Bank & Trust Company, Executor of the Estate of John J. Mitchell, Deceased,

Northern Trust Company, et al, Executors of the Estate of George A. Thorne, Deceased.

Sigmond Bock and Benjamin S. Gunzberg, as Administrators of the Estate of Mayer Wile, Deceased, and

Robert E. Hunter, et al, Executors of the Estate of Edward S. Hunter, Deceased,

move this Honorable Court for leave to file the accompanying brief in this case as amici curiae.

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Supreme Court of the United States

October Term—1931

No. 514

D. B. HEINER, *Collector of Internal Revenue, 23rd District of Pennsylvania,*

v.

JOHN H. DONNAN, SIDNEY B. DONNAN, ALVAN E. DONNAN, *et al.*

Brief of Continental Illinois Bank & Trust Company, as Executor of the Estate of John J. Mitchell, Deceased, et al., as Amici Curiae.

PRELIMINARY STATEMENT

Each of the persons, on whose behalf as amici curiae the instant brief is filed, now has in litigation before a district court of the United States, the Court of Claims of the United States, or the United States Board of Tax Appeals a case in

which there has been raised the question of the constitutionality of the second sentence of section 302(c) of the Revenue Act of 1926. In each of said cases the taxpayer has paid or has had asserted against him a deficiency in Federal estate taxes, and the pending legal proceedings have been brought either for the recovery of the deficiency, where same has been paid, or for the purpose of contesting the asserted additional tax, where same has not been paid. Since said additional taxes are not due if the second sentence of section 302(c) is unconstitutional, it is apparent each person herein has a direct interest in the decision to be rendered on this appeal.

It is the position of the amici curiae herein that said portion of section 302(c) of the Revenue Act of 1926 is unconstitutional, being in conflict with the provisions of the Fifth Amendment to the Constitution of the United States.

ARGUMENT

POINT I.

The second sentence of section 302(c) of the Revenue Act of 1926 deprives the taxpayer of his property without due process of law, in violation of the Fifth Amendment, and is therefore unconstitutional.

The specific point here involved is whether Congress acted within its constitutional authority in

enacting a revenue statute which taxes the transfer of property made "in contemplation of death" and which then provides that a transfer of property made by a decedent within two years prior to his death and without an adequate and full consideration, "shall be deemed and held to have been made in contemplation of death within the meaning of this title." By the quoted provisions of the statute Congress endeavors to create a conclusive presumption that transfers made within two years of death are made in contemplation thereof, without regard to the real facts in the case; and a taxpayer is thereby deprived of his right to submit factual proof that the motivating influence for the transfer, as is often the case, was something other than "contemplation of death."

The relevant provisions of section 302(c) of the 1926 Act differ materially from their predecessors in that the earlier Acts created a rebuttable, not a conclusive, presumption that transfers made within two years of death were made in contemplation thereof. In enacting said section of the 1926 Act, Congress has endeavored to substitute mere legislative fiat for fact in the determination of an issue involving property, which thing, we submit, it is without authority to do. For the purpose of regulating the presentation of evidence or even for the purpose of minimizing the administrative difficulties of enforcing a revenue statute, Congress might well have created a legislative presumption or inference of liability, thereby casting upon the taxpayer the duty of producing some evidence to

the contrary; but it could not deny to the taxpayer the right to present his defense to the liability thus presumed. As said by the Supreme Court in *Mobile, etc. R. R. v. Turnipseed, Administrator*, 219 U. S. 35, 43:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, *it must not*, under guise of regulating the presentation of evidence, *operate to preclude the party from the right to present his defense to the main fact thus presumed.*" (Italics ours.)

In those cases falling within section 302(c) of the 1926 Act, there is no rational connection between the fact proved, viz: an actual transfer within two years of death, and the ultimate fact presumed, viz: that it was made in contemplation of death. For instance; a father might present a wedding gift to his daughter and if within two years he should die, his executors would be called upon to pay a tax upon the wedding gift under the theory that it was made "in contemplation of death". *This actual state of facts, involving a*

wedding gift and the accidental death of the donor in an automobile collision within two years, exists in a case now in litigation in the United States District Court, Northern District of Illinois, Eastern Division, entitled CONTINENTAL ILLINOIS BANK & TRUST CO., ET AL, EXECUTORS OF LAST WILL AND TESTAMENT OF JOHN J. MITCHELL, DECEASED, V. UNITED STATES OF AMERICA. The plaintiff in that case is one of the amici curiae in whose behalf this brief is filed.

It is thus apparent, we submit, that the conclusive presumption of section 2(c), to use the phraseology of the Turnipseed case, supra, is "so unreasonable as to be a purely arbitrary mandate", and as such is invalid.

When in a later case, *Manley vs. Georgia*, 279 U. S. 1, the Supreme Court again had occasion to consider the nature of presumptions, it reiterated the position previously taken in the Turnipseed case, supra, and speaking through Mr. Justice Butler, who wrote for the court, said (pp. 5-6):

> "State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. *If the presumption* is not unreasonable and *is not made conclusive* of the rights of the person against whom raised, *it does not constitute a denial*

of due process of law. Mobile J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 43. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Bailey v. Alabama*, 219 U. S. 219, 233, *et seq.* Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. '* * * it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.'" (Citing cases.) (Italics ours.)

But in considering the issue here before the court, it hardly seems necessary, in examining the authorities, to go beyond the decision of this court in *Schlesinger, et al, Executors v. Wisconsin, et al*, 270 U. S. 230. That case, which arose under the Wisconsin revenue statutes, we believe to be controlling. Except for the fact that a state rather than a federal statute was involved and that the specified period of the presumption was six rather than two years, the Schlesinger case presented issues identical with those now before this Court. In holding the Wisconsin statute invalid because in conflict with the Fourteenth Amendment, the

Court, through Mr. Justice McReynolds who wrote the majority opinion, said (p. 239-240):

"The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere prima facie presumption of fact.

"The court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, they are subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character.

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The differences between the Schlesinger case, supra, and that now before the court, referred to above, are not material in so far as substance is concerned. The court's opinion in the Schlesinger case makes no point of the fact that the period of presumption is six years rather than a shorter time; but makes it clear that the challenged enactment is invalid because it creates a conclusive presumption "without regard to actualities." Likewise the federal statute creates a conclusive presumption without regard to actualities, and it can make no difference that the period of presumption is two rather than six years. In either event the taxpayer is deprived of his right to show what the real facts are. It is the denial of this right that vitiates the statute.

It was so held by the Kentucky Court of Appeals in *State Tax Commission v. Robinson's Executor, et al*, 234 Ky. 415, in which a Kentucky statute was held invalid which provided that transfers of property made within *three* years next before the donor's death shall be presumed to have been made in contemplation of death. There the court held that the State may not fix an arbitrary time before death in which transfers shall be presumed to have been so made.

Nor does it make a difference that the decided case involved a state statute falling within the prohibition of the due process clause of the Fourteenth Amendment, whereas, the enactment now questioned is a federal statute alleged to fall within the prohibition of the Fifth Amendment; for "due process of law" has exactly the same meaning in each of said Amendments: *U. S. v. Armstrong*, 265 Fed. 683. And it has been further held that the due process clause of the Fifth Amendment is broad enough in scope to include the "equal protection of the law" under the Fourteenth Amendment: *U. S. v. Yount*, 267 Fed. 861. With reference to this particular matter the Supreme Court has more recently said in *Bromley v. McCaughn, Collector*, 280 U. S. 124, 138, 139:

> "* * * Graduated taxes on inheritances or successions, with provisions for exemptions, have so often been upheld as not violating either the due process or the equal protection clauses of the Fourteenth

> Amendment, *Stebbins v. Riley*, 268 U. S. 137, as to leave little ground for supposing that taxation by Congress embracing these features, and otherwise valid, could be deemed a denial of the due process clause of the Fifth. See *Van Oster v. Kansas*, 272 U. S. 465, 468."

The position taken by the Supreme Court in the Schlesinger case, supra, was again affirmed in *Uihlein v. Wisconsin*, 273 U. S. 642.

Also in *Hoeper v. Tax Commission of Wisconsin*, 76 L. ed. 145 (decided by the Supreme Court November 30, 1931), this court was asked to, and did, declare unconstitutional a state statute which, as interpreted and applied, deprived the taxpayer of due process and of the equal protection of the law. In denying the appellee's contention that a certain classification of taxpayers was necessary to prevent frauds and evasions, the court, speaking through Mr. Justice Roberts and relying upon the Schlesinger case, said (p. 148):

> "The claimed necessity cannot justify the otherwise unconstitutional exaction."

That very portion of section 302(c) of the 1926 Act which now is challenged has been passed upon by four District Courts of the United States and by the United States Board of Tax Appeals. *Without exception said statute has been declared unconstitutional in each instance:*

Donnan, et al. v. Heiner, Collector, 48 Fed. (2d) 1058 (Now before the United States Supreme Court on Certificate from C. C. A. 3rd).

Delaware Trust Co. v. Handy, Collector, 51 Fed. (2d) 867 (Now before the United States Supreme Court on Certificate from C. C. A. 3rd).

Hall. et al, v. White, Collector, 48 Fed. (2d) 1060 (Affirmed by C. C. A. 1st in 53 Fed. 2d) 210, and now before the United States Supreme Court on petition for writ of certiorari).

Guinzberg, et al. v. Anderson, Collector, 51 Fed. 2d) 592 (Affirmed by C. C. A. 2nd 12-7-31 (not yet reported) and now before the United States Supreme Court on petition for writ of certiorari).

American Security & Trust Co. et al. v. Commissioner of Internal Revenue, 24 B. T. A. 334.

But it has been suggested that the exaction here challenged can be sustained under the authority of *Bromley v. McCaughn*, 280 U. S. 124, as a tax upon gifts inter vivos. This very argument was presented to the Court in the *Guinzberg case, supra*, and in ruling thereon the court said that the Government's argument (p. 593)

"is not only not borne out by the language

of the section, but is thoroughly unsound. Under the statute: (a) The Gift is included in the estate at the value at the date of death irrespective of the value at the time of receipt; (b) the amount of the tax is not based on the gift itself but on the value of the entire net estate; and (c) the tax falls upon the interest of the beneficiaries in the estate, and not upon the donee, unless the estate is inadequate. I do not think, therefore, there is any possible justification for upholding the tax as a gift tax."

Furthermore, it should be noted that the tax in question is imposed by "Title III—Estate Tax" of the Revenue Act of 1926 and is therefore imposed specifically as an estate tax and not as a gift tax. Section 1200 of the Revenue Act of 1926 repeals, as of January 1, 1926, "Part II of Title III (called 'Gift Tax')" of the Revenue Act of 1924. Since Congress by the Revenue Act of 1926, being the very act which for the first time creates the conclusive presumption now in controversy, specifically and definitely repealed the gift tax which had been asserted by the Revenue Act of 1924, it cannot by any theory be said to have imposed a gift tax by adopting said section 302(c) of the Revenue Act of 1926. By said repeal Congress manifested a clear intention to eliminate gift taxes, and we submit that it succeeded in so doing.

CONCLUSION

It is respectfully submitted that the second sentence of section 302(c) of the Revenue Act of 1926 deprives the taxpayer of property without due process of law, in violation of the Fifth Amendment and is therefore unconstitutional and void.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 514.—October Term, 1931.

D. B. Heiner, Collector of Internal Revenue, 23d District of Pennsylvania, *vs.* John H. Donnan, Sidney B. Donnan, Alvan E. Donnan, et al., etc.	On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

[March 21, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case is here on a certificate from the Circuit Court of Appeals for the Third Circuit. On March 1, 1927, John W. Donnan, by complete and irrevocable gift *inter vivos*, transferred without consideration certain securities to trustees for his four children, and also, without consideration, advanced a sum of money to his son. He died on December 23, 1928, less than two years after the gifts and advancement were made. The Commissioner of Internal Revenue included in the gross estate of decedent the value of the property transferred, and imposed a death transfer tax accordingly, on authority of the clause in § 302 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 70 (U. S. C., Sup. V, Title 26, § 1094), which, without regard to the fact, provides that such a transfer made within two years prior to the death of the decedent shall "be deemed and held to have been made in contemplation of death within the meaning of this title."*

*"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. *Where within two years prior to his death* but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in con-

The executors paid the tax, and, after rejection of a claim for refund, brought this action in the federal district court for the western district of Pennsylvania to recover the amount of the tax attributable to the inclusion of the property in question by the commissioner. The trial court found that neither the transfer in trust nor the advancement was made in contemplation of death. Judgment was rendered in favor of the executors on the ground that the foregoing provision of § 302 (c) was unconstitutional as contravening the due process clause of the Fifth Amendment, and void as being repugnant to other sections of the act. 48 F. (2d) 1058. An appeal was taken, and the circuit court of appeals has certified to this court two questions of law upon which instruction is desired:

"1. Does the second sentence of section 302 (c) of the revenue act of 1926 violate the due process clause of the fifth amendment to the Constitution of the United States?

"2. If the answer to the first question be in the negative, is the second sentence of section 302 (c) of the revenue act of 1926 void because repugnant to sections 1111, 1113 (a), 1117, and 1122 (c) of the same act?"

A negative answer to the first question, if made, must rest either upon the ground that Congress has the constitutional power to deny to the representatives of the estate of a decedent the right to show by competent evidence that a gift made within two years prior to the death of the decedent was in fact not made in contemplation of death; or upon the theory that, although the tax in question is imposed as a death transfer tax, it nevertheless may be sustained as a gift tax.

First. Section 301 of the Revenue Act of 1926 imposes a tax "upon the transfer of the net estate of every decedent," etc.

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templation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, *such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title.* Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

There can be no doubt as to the meaning of this language. The thing taxed is the transmission of property from the dead to the living. It does not include pure gifts *inter vivos*. The tax rests, in essence, "upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. . . . it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties." *Knowlton* v. *Moore*, 178 U. S. 41, 56, 57. The value of property transferred without consideration and in contemplation of death is included in the value of the gross estate of the decedent for the purposes of a death tax, because the transfer is considered to be testamentary in effect. *Milliken* v. *United States*, 283 U. S. 15, 23. But such a transfer, not so made, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (*Bromley* v. *McCaughn*, 280 U. S. 124), but obviously not subject to any form of death duty, since it bears no relation whatever to death. The "generating source" of such a gift is to be found in the facts of life and not in the circumstance of death. And the death afterward of the donor in no way changes the situation; that is to say, the death does not result in a shifting, or in the completion of a shifting, to the donee of any economic benefit of property, which is the subject of a death tax, *Chase Nat. Bank* v. *United States*, 278 U. S. 327, 338; *Reinecke* v. *Trust Co.*, 278 U. S. 339, 346; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271; nor does the death in such case bring into being, or ripen for the donee or anyone else, so far as the gift is concerned, any property right or interest which can be the subject of any form of death tax. Compare *Tyler* v. *United States*, 281 U. S. 497, 503. Complete ownership of the gift, together with all its incidents, has passed during the life of both donor and donee, and no interest of any kind remains to pass to one or cease in the other in consequence of the death which happens afterward.

The phrase "in contemplation of or intended to take effect . . . at or after his death," found in the provisions of § 302 (c) of the act of 1926 and prior acts, as applied to fully executed gifts *inter vivos*, puts them in the same category for purposes of taxation with gifts *causa mortis*. In this light, the meaning and pur-

pose of the provision were considered, in a recent decision of this court dealing with the Revenue Act of 1918. *United States* v. *Wells*, 283 U. S. 102, 116-117, 118:

"The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. Nichols *v.* Cooldige, 274 U. S. 531, 542; Milliken *v.* United States, *ante*, p. 15. As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. As a condition of body or mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or non-existence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death. The natural and reasonable inference which may be drawn from the fact that but a short period intervenes between the transfer and death, is recognized by the statutory provision creating a presumption in the case of gifts within two years prior to death. But this presumption, by the statute before us, [Act of 1918] is expressly stated to be a rebuttable one, and the mere fact that death ensues even shortly after the gift does not determine absolutely that it is in contemplation of death. The question, necessarily, is as to the state of mind of the donor.

. . . . . .

"If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive. Such transfers were made the subject of a distinct gift tax, since repealed."

There is no doubt of the power of Congress to provide for including in the gross estate of a decedent, for purposes of the death tax, the value of gifts made in contemplation of death; and likewise no doubt of the power of that body to create a rebuttable presumption that gifts made within a period of two years prior to death are made in contemplation thereof. But the presumption here created is not of that kind. It is made definitely conclusive—incapable of being overcome by proof of the most positive character. Thus stated, the first question submitted is answered in the affirmative by *Schlesinger* v. *Wisconsin*, 270 U. S.

230, and *Hoeper* v. *Tax Commission*, 284 U. S. 206. The only difference between the present case and the *Schlesinger* case is that there the statute fixed a period of six years as limiting the application of the presumption, while here it is fixed at two; and there the Fourteenth Amendment was involved, while here it is the Fifth Amendment. The length of time was not a factor in the case. The presumption was held invalid upon the ground that the statute made it conclusive without regard to actualities, while like gifts at other times were not thus treated; and that there was no adequate basis for such a distinction. "The presumption and consequent taxation," the court said (p. 240), "are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The *Schlesinger* case has since been applied many times by the lower federal courts, by the Board of Tax Appeals, and by state courts;* and none of them seem to have been at any loss to understand the basis of the decision, namely, that a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment.

Nor is it material that the Fourteenth Amendment was involved in the *Schlesinger* case, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. *Coolidge* v. *Long*, 282 U. S. 582, 596. That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment is settled.

*See for example, *Hall* v. *White*, 48 F. (2d) 1060; *Donnan* v. *Heiner*, 48 F. (2d) 1058 (the present case); *Guinsburg* v. *Anderson*, 51 F. (2d) 592; *American Security & Trust Co. et al., Executors*, 24 B. T. A. 334; *State Tax Commission* v. *Robinson's Executor*, 234 Ky. 415 (involving a three year period).

Nichols v. *Coolidge*, 274 U. S. 531, 542; *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 24-25; *Tyler* v. *United States*, *supra*, p. 504.

In *Hoeper* v. *Tax Commission*, *supra*, this court had before it for consideration a statute of Wisconsin which provided that in computing the amount of income taxes payable by persons residing together as members of a family, the income of the wife should be added to that of the husband and assessed to and payable by him. We held that, since in law and in fact the wife's income was her separate property, the state was without power to measure his tax in part by the income of his wife. At page 215 we said:

"We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. Compare *Nichols* v. *Coolidge*, 274 U. S. 531, 540."

The suggestion of the state court that the provision was valid as necessary to prevent frauds and evasions of the tax by married persons was definitely rejected on the ground that such claimed necessity could not justify an otherwise unconstitutional exaction.

In substance and effect, the situation presented in the *Hoeper* case is the same as that presented here. In the first place, the tax, in part, is laid in respect of property shown not to have been transferred in contemplation of death and the complete title to which had passed to the donee during the lifetime of the donor; and secondly, the tax is not laid upon the transfer of the gift or in respect of its value. It is laid upon the transfer, and calculated upon the value, of the estate of the decedent, such value being enhanced by the fictitious inclusion of the gift, and the estate made liable for a tax computed upon that value. Moreover, under the statute the value of the gift when made is to be ignored, and its value arbitrarily fixed as of the date of the donor's death. The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description. Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the *Schlesinger* and *Hoeper* cases condemn as arbitrary and

a denial of due process of law. Such an exaction is not taxation but spoliation. "It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property." *United States* v. *Railroad Company*, 17 Wall. 322, 326.

The presumption here excludes consideration of every fact and circumstance tending to show the real motive of the donor. The young man in abounding health, bereft of life by a stroke of lightning within two years after making a gift, is conclusively presumed to have acted under the inducement of the thought of death, equally with the old and ailing who already stands in the shadow of the inevitable end. And although the tax explicitly is based upon the circumstance that the thought of death must be the impelling cause of the transfer (*United States* v. *Wells, supra*, p. 118), the presumption, nevertheless, precludes the ascertainment of the truth in respect of that requisite upon which the liability is made to rest, with the result, in the present case and in many others, of putting upon an estate the burden of a tax measured in part by the value of property never owned by the estate or in the remotest degree connected with the death which brought it into existence. Such a statute is more arbitrary and less defensible against attack than one imposing arbitrarily retroactive taxes, which this court has decided to be in clear violation of the Fifth Amendment. As said by Judge Learned Hand in *Frew* v. *Bowers*, 12 F. (2d) 625, 630, "Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

To sustain the validity of this irrebuttable presumption it is argued, with apparent conviction, that under the *prima facie* presumption originally in force there had been a loss of revenue, and decisions holding that particular gifts were not made in contemplation of death are cited. This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty, a new and startling doctrine, condemned by its mere statement and distinctly repudiated by this

court in the *Schlesinger* (p. 240) and *Hoeper* (p. 217) cases involving similar situations. Both emphatically declared that such rights were superior to this supposed necessity.

The government makes the point that the conclusive presumption created by the statute is a rule of substantive law, and, regarded as such, should be upheld; and decisions tending to support that view are cited. The earlier revenue acts created a *prima facie* presumption, which was made irrebuttable by the later act of 1926. A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof, *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35, 43; and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, and the result is the same, unless we are ready to overrule the *Schlesinger* case, as we are not; for that case dealt with a conclusive presumption and the court held it invalid without regard to the question of its technical characterization. This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment. For example, *Bailey* v. *Alabama*, 219 U. S. 219, 238, *et seq.*; *Manley* v. *Georgia*, 279 U. S. 1, 5-6. "It is apparent," this court said in the *Bailey* case (p. 239) "that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."

If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law.

Second. The provision in question cannot be sustained as imposing a gift tax, (1) because the intent of Congress to enact the provision as an incident of the death tax and not as a gift tax

is unmistakable; and (2) because, if construed as imposing a gift tax, it is in that aspect still so arbitrary and capricious as to cause it to fall within the ban of the due process clause of the Fifth Amendment.

1. The intent of Congress to include gifts made in contemplation of death as integral parts of the decedent's estate for the purposes of the death tax only is so clear as, reasonably, to preclude argument to the contrary. In *United States* v. *Wells, supra,* this court held, as already shown, that since it is the thought of death, as a controlling motive prompting the gift, that affords the test whether it is made in contemplation of death, "it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive. Such transfers were made the subject of a distinct gift tax, since repealed." And see *Reinecke* v. *Trust Co., supra,* at p. 347. It is significant that the repeal of the gift tax referred to was made by the same act (c. 27, § 1200 (a), 44 Stat. 9, 125), which contains the provision here in question. The tax is imposed upon the transfer of the net estate, but it is first necessary to ascertain the value of the gross estate, and the statute provides that this is to be determined by including, among other things, the value of any interest in property of which the decedent has at any time made a transfer in contemplation of his death. The statute requires that this value shall be determined as of the time of the decedent's death, without regard to the value of the gift when received. The event upon which the tax is made to depend is not the transfer of the gift, but the transfer of the estate of the decendent. The tax falls upon the estate and not upon the gift, and is computed not upon the value of the gift, but, by progressively graduated percentages, upon the value of the entire estate. It is so apparent from a consideration of these features of the statute that Congress could not have had, even remotely, in mind the imposition of a gift tax, that to construe the provision in question as imposing such a tax is to disregard the plain language and the plain intent of the act. For this court to do so would be to enact a law under the pretense of construing one and thus pronounce itself guilty of a flagrant perversion of the judicial power.

2. But if we assume, contrary to what is reasonable, that a gift tax is imposed by providing that the value of property trans-

ferred without consideration by a decedent within two years prior to his death shall be included in the value of the gross estate, the case for the government is no better. In the *Schlesinger* case, the Supreme Court of Wisconsin had expressly held that the tax could not be supported as one on gifts *inter vivos* only, saying, "Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event. It is because only one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid." *Estate of Schlesinger,* 184 Wis, 1, 10. This court accepted that view in these words (p. 239): "The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment." And it follows that the present provision, written in almost identical terms, is in plain conflict with the Fifth Amendment. The provisions of the statute referred to in the preceding paragraph of this opinion necessarily condition the tax, however it be characterized. If it be a gift tax, it, nevertheless, is based, not upon the transfer of the gift, but upon the transfer of the estate; and upon the value of the estate, and not that of the gift. Obviously these are bases having no relation whatever to the gift. Moreover, the value of the gift is not to be determined as of the time when made, but, considered as a part of the estate, is to be fixed as of the date of the decedent's death—a condition so obviously arbitrary and capricious as, by itself, to condemn the tax, viewed as a gift tax, as violative of due process. It is to be paid by the beneficiaries of the decedent, although it is impossible for them to share in the gift which has passed beyond recall. It is, therefore, a contribution to the government exacted of one person, based *pro tanto* upon the wealth of another.

Considered as a gift tax, these conditions demonstrate the entire lack of relation between the taxpayer and the transfer which is the subject of the tax. They disclose that there is no rational ground for measuring the tax, considered as a gift tax and not as a death tax, by the value of an estate coming into being after the

gift has become complete and irrevocable, and of which the gift comprises no part. And they show that to impose liability for the tax, as a gift tax, upon the estate, as they in terms require, is, in effect, to exact tribute from the gains or property of one measured by the gains or property of another.

The first question must be answered in the affirmative and this makes it unnecessary to answer the second.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 514—October Term, 1931.

D. B. Heiner, Collector of Internal Revenue, 23rd District of Pennsylvania, *vs.* John H. Donnan, Sidney B. Donnan, Alvan E. Donnan, et al., etc.	On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

[March 21, 1932.]

Mr. Justice Stone.

I think the tax involved in this and its companion case, No. 546, *Handy, Collector* v. *Delaware Trust Company,* is in all respects valid, and that the certified questions in both cases should be answered in the negative.

The present federal estate tax, enacted in 1916, Title II of the Revenue Act of 1916, c. 463, 39 Stat. 777, has been continued in each successive Revenue Act. Although levied upon the privilege of transferring property passing at death and imposed on the estates of decedents, the prescribed tax was not limited to such transfers. By § 202 (b) and (c) of the 1916 Act it was extended to gifts *inter vivos,* made in contemplation of death, and to gifts of property upon joint tenancy or tenancy by the entirety, the benefit of which inured to the surviving tenant upon the death of the donor. Both classes of gifts were taxed as a part of the decedent's estate at the rates prescribed by the estate tax. The obvious purpose of these provisions was to prevent or compensate for the withdrawal of property by gifts *inter vivos* from the operation of the estate tax. The 1918 Revenue Act, § 402 (c) and (f), c. 18, 40 Stat. 1057, 1097, included in the donor's estate, subject to the estate tax, all gifts effected by any trust taking effect in possession or enjoyment at the time of the donor's death, and the proceeds in excess of $40,000 of life insurance purchased by the

decedent in his lifetime and payable to named beneficiaries at his death.

As a further measure for preventing avoidance of the tax by gifts *inter vivos*, Congress, in 1924, adopted the gift tax, §§ 319-324 of the Revenue Act of that year, c. 234, 43 Stat. 253, 313-316. That it was adopted as a measure to prevent avoidance of the estate tax sufficiently appears from the fact that the graduated rates and exemptions of the tax were the same as in the case of testamentary transfers, §§ 301 (a), 319, 303 (a) (4), 321 (a) (1),[1] and from the fact that in the Revenue Act of 1926 the retroactive reductions in rates of the estate tax were extended to the rates of the gift tax. §§ 301, 324, Revenue Act of 1926, c. 27, 44 Stat. 9, 69, 86. Provisions were also made for crediting the gift tax against the estate tax where the amount of the gift was later required to be included in the decedent's gross estate. § 322, Revenue Act of 1924, 43 Stat. 316; § 404, Revenue Act of 1928, c. 852, 45 Stat. 791, 863.

Because of inequalities and inconvenience, expense and other difficulties in its operation and administration, the gift tax was repealed by § 1200 of the Revenue Act of 1926, 44 Stat. 125;[2] and as a result of ten years' experience in the administration of the estate tax and particularly of the provision taxing gifts in contemplation of death, the present provision of § 302 (c) of the Revenue Act of 1926, 44 Stat. 70, was added, which operates to impose the tax on all gifts made within two years of death, regardless of the purpose or motive of the donor. The Ways and Means Committee of the House of Representatives, in its report recommending this legislation (House Report No. 1, 69th Congress, 1st Sess., p. 15), pointed out that the tax on gifts in contemplation of death had been ineffective in its practical administration, with a great loss of revenue to the Government in consequence, and that "the difficulty of enforcement will be even more serious in view of the repeal of the gift tax". It stated, without qualification, that the amendment was one imposing the tax on all gifts made within two years of death, and said that "the

[1] See also House Report No. 179, 68th Congress, 1st Sess., p. 75; Congressional Record, Vol. 65, Part 3, pp. 3119, 3120, 3122; Part 4, pp. 3371, 3372, 3373; Part 8, pp. 8094, 8095, 8096.

[2] See Senate Report No. 52, 69th Congress, 1st Sess., p. 9.

inclusion of this provision will prevent most of the evasion and is the only way in which it can be prevented."[8]

As we are concerned here only with the power of Congress to tax such gifts, I shall take no time in discussing the particular form of language by which Congress has sought to accomplish its purpose. In this statute taxing gifts *inter vivos*, as though they were legacies, it can be of no consequence whether the enactment says that all gifts within two years of death of the donor are irrebuttably presumed to be in contemplation of death or whether more directly it imposes the tax on all gifts made within two years of the donor's death. In either case, we are concerned only with the power which, here, the legislative body has indisputably sought to exert, and not with the particular choice of words by which it has expressed that purpose.

The question, reduced to its simplest terms, is whether Congress possesses the power to supplement an estate tax, and protect the revenue derived from it, as was its declared purpose, by a tax on all gifts *inter vivos*, made within two years of the death of the donor at the same rate and in the same manner as though the gift were made at death. I think it has.

At the outset it is to be borne in mind that gifts *inter vivos* are not immune from federal taxation. Whatever doubts may formerly have been entertained, it is now settled that the national Government may tax all gifts *inter vivos* and at rates comparable to those which may be imposed on gifts at death. *Bromley* v. *McCaughn*, 280 U. S. 124. That the present gifts were *inter vivos*, made in

[8]This consideration seems also to have motivated the corresponding English legislation. In 1881 England adopted a statute, 44 Vict. c. 12, § 38 (2) (a), which included gifts *inter vivos*, made within three months of the death, in the donor's estate, subject to death duties. The three months was increased to one year, in 1889, 52 Vict. c. 7, Sec. 11 (1), and to three years in 1910, 10 Edw. VII, c. 8, § 59 (1), the last provision remaining in force, except in some particular circumstances not now necessary to mention, until the present time.

The brief for the Government in No. 514, Appendix B, lists fourteen states which, prior to the enactment of the present statute in 1926, had found it necessary or expedient to adopt similar legislation; the state statutes subjected to inheritance taxation gifts made within periods ranging from one to six years of the donor's death. See also Sabine, "Transfers In Contemplation of Death", 5 Internal Revenue News, September, 1931, p. 8.

the lifetime of the donors and effected as are any other dispositions of property passing from the donors independently of death, is not in dispute. The question then is, not whether they may be taxed, but, more narrowly, whether the Congressional selection of some such gifts—those made within two years of death—and their taxation as though made at death, as an adjunct to the estate tax, is so arbitrary and unreasonable as to amount to a taking of property without due process of law, prohibited by the Fifth Amendment.

That question was not answered by *Schlesinger* v. *Wisconsin*, 270 U. S. 230. If it had been, this case could and doubtless would be disposed of *per curiam* on the authority of that one. This case comes to us after ten years of experience in the administration of the estate tax, an experience which was not available, or at least not presented, in the *Schlesinger* case. There, all gifts made within six years of death were taxed. Here, only those within two years of death are within the statute. There, the tax was a succession tax and so was a burden on the right to receive, *Leach* v. *Nichols*, — U. S. —, decided March 14, 1932, and necessarily payable by the donee, but at rates and valuations prevailing at the time of the donor's death. Here, the tax was upon the transfer effected by the donor's gift after the enactment of the statute, and is payable from the donor's estate at the same rates and values as though it had passed at his death. It burdens the estate of the donor before distribution, exactly as does the estate tax. *New York* v. *Eisner*, 256 U. S. 345; *Leach* v. *Nichols*, *supra*. In the *Schlesinger* case, the Court declared (p. 240) that the gifts were "subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character". And in stating the argument presented and rejected there, the Court said (p. 240):

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B' ".

Here, a graduated tax imposed by Congress on gifts *inter vivos* is not forbidden, *Bromley* v. *McCaughn*, *supra*, and the case is not

one where A's property is taxed to enable the Government to collect lawful charges against B. Here A's gift, which may be lawfully taxed, is, in this instance, taxed because it removes property from the operation of another tax, which, but for the gift, would be applied to the property at A's death. Concededly there is nothing in the Federal Constitution or laws which necessarily precludes taxation of gifts at the same rate and value as if they had passed at the donor's death, rather than at the rate and value prevailing at the time of the gift. The tax upheld in *Bromley* v. *McCaughn, supra,* taxed all gifts *inter vivos* at the same rates and with the same exemptions as in the case of testamentary transfers. In *Milliken* v. *United States,* 283 U. S. 15, 20, a selected class of gifts *inter vivos,* which were not testamentary although made in contemplation of death, were so taxed as a part of the donor's estate. See *Phillips* v. *Dime Trust & Safe Deposit Co.,* 284 U. S. 160. In *Tyler* v. *United States,* 281 U. S. 497, we upheld taxation, as a part of the donor's estate, of another selected class of gifts *inter vivos,* estates by the entirety donated by one spouse for the benefit of both, although the gift was not testamentary and neither title, possession, nor enjoyment passed at death. Similar taxation of gifts made *inter vivos,* but finally effective only at death, was sustained in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, and *Chase National Bank* v. *United States,* 278 U. S. 327; see *Taft* v. *Bowers,* 278 U. S. 470, 482.

In the *Schlesinger* case the classification of the gifts selected for taxation under the state statute was deemed to be so arbitrary as to violate the Fourteenth Amendment, which forbids state legislation denying equal protection of the laws. Here, we are concerned only with the Fifth Amendment. As was said by this Court in *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 392:

"The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts and excises laid by Congress is the territorial uniformity required by Art. I, § 8. . . . The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the States under the equal protection clause, much less of Congress under the more general requirement of due process of law in taxation." See Treat v. White, 181 U. S. 264, 269; Flint v. Stone Tracy Co., 220 U. S. 107, 158; Barclay & Co. v. Edwards, 267 U. S. 442, 450.

No tax has been held invalid under the Fifth Amendment because based on an improper classification, and it is significant that

in the entire one hundred and forty years of its history, the only taxes held condemned by the Fifth Amendment were those deemed to be arbitrarily retroactive. See *Nichols* v. *Coolidge*, 274 U. S. 531; *Untermeyer* v. *Anderson*, 276 U. S. 440; *Coolidge* v. *Long*, 282 U. S. 582.

It is, I think, plain, then, that this tax cannot rightly be held unconstitutional on its face. These gifts *inter vivos*, not being immune from taxation, and the obvious and permissible purpose of the present and related sections being to protect the revenue derived from the taxation of estates,[4] want of due process in taxing them can arise only because the selection of this class of gifts within two years of death, for taxation at the prescribed rates, is so remote from the permissible policy of taxing transfers at death or so unrelated to it as to be palpably arbitrary and unreasonable.

It is evident that the practice of disposing of property by gift *inter vivos*, if generally adopted, would, regardless of the age or motive of the donor, defeat or seriously impair the operation of the estate tax, and that the practice would be encouraged if such gifts, made shortly before the death of the donor, were left free of any form of taxation. That in itself would be a legitimate ground for taxing all gifts at the same rates as legacies, as was done by the gift tax; but since the object is to protect the revenue to be derived from the estate tax, the Government is not bound to tax every gift without regard to its relation to the end sought or the convenience and expense of the Government in levying and collecting it. It may aim at the evil where it exists and select for taxation that class of gifts which experience has shown tends most to defeat the estate tax. This Court has held explicitly that the Fourteenth Amendment does not forbid the selection of subjects for one form of taxation for the very reason that they may not be readily or effectively reached by another tax which it is the legislative policy to maintain. *Watson* v. *State Comptroller*, 254 U. S. 122, 124, 125. And since the imposition of the one tax is induced by the purpose to compensate for the loss of the other, the effect in accomplishing this result may itself be the basis of the selection of subjects of taxation. *St. John* v. *New York*, 201 U. S. 633; *District of Co-*

[4] House Report, Ways and Means Committee, No. 1, 69th Congress, 1st Sess., p. 15. See Tyler v. United States, 281 U. S. 497, 505; Milliken v. United States, 283 U. S. 15, 20.

lumbia v. *Brooke*, 214 U. S. 138, 150; *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 69.

That being the object here, it is not imperative that the motive of the donor be made the exclusive basis of the selection of these gifts for taxation, as in the case of gifts made in contemplation of death. The fact that such gifts, made shortly before death, regardless of motive, chiefly contribute to the withdrawal of property from operation of the estate tax, is enough to support the selection, even though they are not conscious evasions of the estate tax, and opprobrious epithets cannot certainly be applied to them. The opinion of the Court does not deny that Congress has power to select, on this basis, certain gifts to be taxed as estates are taxed. In fact, this Court has recently held that Congress does possess that power and has said so in language completely applicable to the present tax. In *Tyler* v. *United States*, 281 U. S. 497, 505, the tax on estates by the entirety, as a part of the decedent's estate passing to the surviving spouse, was upheld regardless of the motive which inspired it, and the decision was rested on the sole and only possible ground that "the evident and legitimate aim of Congress was to prevent an avoidance in whole or in part, of any of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds have been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part entirely appropriate as a means to that end." See also *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; ~~*Chase National Bank v. United States*~~, 278 U. S. 470, 482. Taft v Bowers

The gifts taxed may, in some instances, as the present opinion states, bear no relation whatever to death, except that all are near death. But that all do have an intimate and vital relation to the policy of taxing the estates of decedents at death, cannot be gainsaid, for what would otherwise be taxed is, by the gift, withdrawn from the operation of the taxing act, and the revenue derived from the taxation of estates necessarily impaired, unless the act which impairs it, the giving away of property *inter vivos*, is itself taxed. It cannot be said generally that gifts made near the time of death do not have a greater tendency to defeat the estate tax than gifts made at periods remote from it, both because of the greater number and amounts of the former and because such gifts more certainly withdraw the property from the operation of the estate tax than

do the earlier and relatively infrequent gifts of property which may be lost or destroyed before the donor's death. Gifts of amounts in excess of $5,000 to one donee in any one year, which alone are taxed, are usually made from substantial fortunes which, in the generality of cases, are accumulated relatively late in life, and the great bulk of which, if not given away in life, would pass at death. Nor can it be denied that the cost and inconvenience of collecting the tax on earlier, generally smaller, and less frequent gifts, which led to the repeal of the gift tax, may not themselves require or justify a distinction between them and gifts made nearer to the time of death.

Since Congress has power to make the selection if the facts warrant, we cannot say *a priori* that such facts do not exist or that in making the selection which it did, Congress acted arbitrarily or without the exercise of the judgment or discretion which rightfully belong to it. *Stebbins* v. *Riley*, 268 U. S. 137, 143. As was said in *Ogden* v. *Saunders*, 12 Wheat. 213, 270, it is but a proper

". . . . respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt."

The existence of facts underlying constitutionality is always to be presumed, and the burden is always on him who assails the selection of a class for taxation to establish that there could be no reasonable basis for the legislative judgment in making it.[5]

But even if that presumption is not to be indulged, in passing on the power of Congress to impose this tax, we cannot rightly disregard the nature of the difficulties involved in the effective administration of a scheme for taxing transfers at death, and we cannot close our eyes to those perhaps less apparent, which have been disclosed by the experience with this form of taxation in the United States, which led to the enactment of the present statute.

It is evident that the estate tax, if not supplemented by an effective provision taxing gifts tending to defeat it, would, to a considerable extent, fail of its purpose. The tax on gifts made in

[5]Sinking Fund Cases, 99 U. S. 700, 718; Nicol v. Ames, 173 U. S. 509, 514-515; Buttfield v. Stranahan, 192 U. S. 470, 492; Graves v. Minnesota, 272 U. S. 425, 428; Zahn v. Board of Public Works, 274 U. S. 325, 328; Euclid v. Ambler Realty Co., 272 U. S. 365, 395; Hardware Dealers Mutual Fire Insurance Company v. Glidden, 284 U. S. 151, 158; O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U. S. 251, 257-258.

contemplation of death, devised for this purpose, has been upheld by this Court, *Milliken* v. *United States*, 283 U. S. 15, but the difficulties of its successful administration have become apparent. The donor of property which would otherwise be subject to heavy taxes at his death does not usually disclose his purpose in making the gift, even if he does not conceal it. He may not, and often does not, analyse his motives or determine for himself whether his dominating purpose is to substitute the gift for a testamentary disposition which would subject it to the tax, see *Milliken* v. *United States*, *supra*, p. 23; *United States* v. *Wells*, 283 U. S. 102, or whether it is so combined with other motives as to preclude its taxation, even though in making it the donor cannot be unaware that he, like others, must die and that his donation will, in the natural course of events, escape the tax which will be imposed on his other property passing at death. See *United States* v. *Wells*, *supra*. The difficulty of searching the motives and purposes of one who is dead, the proofs of which, so far as they survive, are in the control of his personal representatives, need not be elaborated. As the event has proved, the difficulties of establishing the requisite mental state of the deceased donor has rendered the tax on gifts in contemplation of death a weak and ineffective means of compensating for the drain on the revenue by the withdrawal of vast amounts of property from the operation of the estate tax.

The Government has been involved in 102 cases arising under § 202 (b) of the 1916 Revenue Act and its successors.[6] This number does not include any of the cases arising under § 302 (c) of the Revenue Act of 1926, the statute under present consideration. And it includes only those cases, decision of which was determined by the answer made to the question of fact, whether a gift had been made in contemplation of death.

In 20 cases involving gifts of approximately $4,250,000, the Government was successful.[7] In 3 it was partially successful;[8] and in

[6] Revenue Act of 1916, § 202 (b), c. 463, 39 Stat. 756, 778; Revenue Act of 1918, § 402 (c), c. 18, 40 Stat. 1057, 1097; Revenue Act of 1921, § 402 (c), c. 136, 42 Stat. 227, 278; Revenue Act of 1924, § 302 (c), c. 254, 43 Stat. 253, 304.

[7] In 18 of these cases the gifts were made within two years of death. The value of the gifts so made was approximately $3,000,000, exclusive of certain realty and personalty, the value of which was not definitely indicated in the re-

78 involving gifts largely in excess of $120,000,000, it was unsuccessful. In another the jury disagreed.[9]

In 56 of the total of 78 cases decided against the Government, the gifts were made within two years of death. In this group of 56 donors, two were more than ninety years of age at the time of death; ten were between eighty and ninety; twenty-seven were between seventy and eighty; six were between sixty and seventy; six were between fifty and sixty; and only one was younger than fifty.[10] There was one gift of $46,000,000, made within two months of death by a donor seventy-one years of age at death;[11] one of $36,790,000 made by a donor over eighty, who consulted a tax expert before making the gift;[12] one of over $10,400,000 made by a donor aged seventy-six, six months before death;[13] and one by a donor aged seventy-five at death, in which the tax assessed was

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ports. Among this group of cases was one in which the gift was $880,100, made when the donor was advised by his physician that he was about to die, Phillips *v.* Gnichtel, 27 F. (2d) 662, cert. den. 278 U. S. 636; another of $421,200 made within four months of death by a donor seventy-two years of age, Luscomb *v.* Commissioner, 30 F. (2d) 818; one of over $1,000,000, Brown *v.* Routzahn, not yet reported (N. D. Ohio); and one of $312,000, Kunhardt *v.* Bowers, not reported (S. D. N. Y.). Two of the gifts were of more than $200,000, Rengstorff *v.* McLaughlin, 21 F. (2d) 177; Green *v.* Commissioner, 6 B. T. A. 278. Six were of more than $100,000, Farmers Bank & Trust Co. *v.* Commissioner, 10 B. T. A. 43; Burling *v.* Commissioner, 13 B. T. A. 264; Hale *v.* Commissioner, 18 B. T. A. 342; Sugerman *v.* Commissioner, 20 B. T. A. 960; McClure *v.* Commissioner, not yet reported (C. C. A. 5th); Neal *v.* Commissioner, 53 F. (2d) 806. Two were of more than $50,000, Second National Bank *v.* Commissioner, 12 B. T. A. 1066; Latham *v.* Commissioner, 16 B. T. A. 48. The others were either less than that amount, Kahn *v.* Commissioner, 4 B. T. A. 1289; Wheelock *v.* Commissioner, 13 B. T. A. 828; Rolfe *v.* Commissioner, 16 B. T. A. 519; or the appraised value of the gifts is not shown, Schoenheit *v.* Lucas, 44 F. (2d) 476; Lehman *v.* Commissioner, 6 B. T. A. 791; Appeal of Ward, 3 B. T. A. 879.

[8]Serrien *v.* Commissioner, 7 B. T. A. 1129; Bloch *v.* McCaughn, not reported (E. D. Pa.); Kelly *v.* Commissioner, 8 B. T. A. 1193.

[9]Byron *v.* Tait, not reported (D. Md.)

[10]The age of four of the donors is not shown definitely by the reports, but as to at least three of these, there are indications that the decedents were of advanced years.

[11]Estate of Astor, not yet reported (S. D. N. Y.).

[12]Commissioner *v.* Nevin, 47 F. (2d) 478; cert. den. 283 U. S. 835.

[13]Rea *v.* Heiner, 6 F. (2d) 389.

over $1,000,000.[14] There was one other in excess of $2,000,000;[15] 5 others largely in excess of $1,000,000;[16] 4 others in excess of $500,000;[17] 13 in excess of $250,000;[18] and 14 in excess of $100,000.[19] The value of the gifts was not shown definitely in 3 cases;[20] 12 involved gifts totalling less than $100,000.[21] In the remaining 22 cases the gifts were made more than two years before the death of the donor.[22]

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[14]Flannery *v.* Willcuts, 25 F. (2d) 951.

[15]White *v.* Commissioner, 21 B. T. A. 500.

[16]Crilly *v.* Commissioner, 15 B. T. A. 470; Gimbel *v.* Commissioner, 11 B. T. A. 214; Stieff *v.* Tait, not reported (D. Md.); Loughran *v.* McCaughn, not reported (E. D. Pa.); American Security & Trust Co. *v.* Commissioner, 24 B. T. A. 334.

[17]Esty *v.* Mitchell, unreported (D. Mass.); Brehmen *v.* McCaughn, unreported (E. D. Pa.); United States *v.* Wells, 283 U. S. 102; Appeal of Borden, 6 B. T. A. 255.

[18]Mather *v.* McLaughlin, not yet reported (E. D. Pa.); Pohlman *v.* United States, not reported (D. Neb.); Apperson *v.* Thurman, not reported (D. Ind.); Beltzhoover *v.* Donald, not reported (S. D. Miss.); Safford *v.* United States, 65 Ct. Cl. 242; Romberger *v.* Commissioner, 21 B. T. A. 193; Moore *v.* Commissioner, 21 B. T. A. 279; Lavelle *v.* Commissioner, 8 B. T. A. 1150; Boggs *v.* Commissioner, 11 B. T. A. 824; White *v.* Commissioner, 15 B. T. A. 470; Jaeger *v.* Commissioner, 16 B. T. A. 897; Fidelity-Philadelphia Trust Co. *v.* Commissioner, 17 B. T. A. 910; Vaughn *v.* Riordan, 280 Fed. 742.

[19]Wilfley *v.* Helmich, not reported (E. D. Mo.); Richardson *v.* Tait, not reported (D. Md.); Armstrong *v.* Rose, not reported (S. D. Ga.); Off *v.* United States, 35 F. (2d) 222; Loetscher *v.* Burnet, 46 F. (2d) 835; Howard *v.* United States, 65 Ct. Cl. 832; Allen *v.* Commissioner, 20 B. T. A. 713; Rogers *v.* Commissioner, 21 B. T. A. 1124; Mississippi Valley Trust Co. *v.* Commissioner, 22 B. T. A. 136; Gerry *v.* Commissioner, 22 B. T. A. 748; Estate of Connell, 11 B. T. A. 1254; United States Trust Co. *v.* Commissioner, 14 B. T. A. 312; Pratt *v.* Commissioner, 18 B. T. A. 377; Meyer *v.* United States, 60 Ct. Cl. 474.

[20]Beeler *v.* Motter, 33 F. (2d) 788; Loxier *v.* Commissioner, 7 B. T. A. 1050; Heipershausen *v.* Commissioner, 18 B. T. A. 218.

[21]Root *v.* United States, not yet reported (S. D. Fla.); Molton *v.* Sneed, not reported (N. D. Ala.); Owen *v.* Gardner, not reported (E. D. N. Y.), Cromwell *v.* Commissioner, 24 B. T. A. 461; Appeal of Kaufman, 5 B. T. A. 31; Schulz *v.* Commissioner, 7 B. T. A. 900; Davis *v.* Commissioner, 9 B. T. A. 1212; Goldman *v.* Commissioner, 11 B. T. A. 92; Gaither *v.* Miles, 268 Fed. 692; Appeal of Richardson, 1 B. T. A. 1196; Appeal of McDonald, 2 B. T. A. 1295; Appeal of Hillenmeyer, 2 B. T. A. 1322.

[22]The total value of these gifts, exclusive of realty, was $6,707,056. Tesdell *v.* United States, not reported (S. D. La.); Mason *v.* United States, 17 F. (2d) 317; Tips *v.* Bass, 21 F. (2d) 460; Smart *v.* United States, 21 F.

The judgment of the Ways and Means Committee that the provision of § 302 (c) of the 1926 Act was required to stop the drain on the revenues from the estate tax, is strikingly confirmed by these 56 cases. The value of the gifts in those cases alone, was $113,401,157, a total that does not include realty and personalty of undetermined value or the very large gifts on which the Government, in the case already noted, sought to collect a tax of more than $1,000,000.

In many of the cases, notably those in which large amounts were involved, the gift was substantially all the donor's estate. In the others, the addition of the amount of the gifts to the estate of the donor would place the tax on the gifts in the higher brackets, so that the total amount of the tax that might have been collected is much larger than the tax that would have been payable on the gifts considered separately from the estates of which they had been part. It is also fairly inferable that the cases actually litigated constitute only a small portion of the instances in which large gifts were made within two years of the donor's death.

These are but a few of the many details of the administration of the Act supporting the conclusion of Congressional committees that large amounts of money and property were being withdrawn from the operation of the estate tax by gifts *inter vivos* under circumstances which clearly indicated that but for the gifts all would have been taxed as a part of the donors' estates, and that by far the greater number and amount of such gifts had been made within two years of death by persons of advanced age.

The present tax, if objectionable, is not so because motive or intention of the donor is not made the basis of the classification. It is not so because it does not tend to prevent or compensate for the evil aimed at. It is not so because the revenue leak will not be effectively stopped by including in the estate tax all gifts made within two years of death. Legislation to accomplish that end, and reasonably adapted to it, cannot be summarily dismissed as being

(2d) 188; McCaughn v. Carvill, 43 F. (2d) 69; Phillips v. Commissioner, 7 B. T. A. 1054; Stein v. Commissioner, 9 B. T. A. 486; Baum v. Commissioner, 21 B. T. A. 176; Appeal of Spafford, 3 B. T. A. 1016; Hausman v. Commissioner, 5 B. T. A. 199; Fleming v. Commissioner, 9 B. T. A. 419; Brehmer v. Commissioner, 9 B. T. A. 423; Hicks v. Commissioner, 9 B. T. A. 1226; Wolfermann v. Commissioner, 10 B. T. A. 285; Illinois Merchants Trust Co. v. Commissioner, 12 B. T. A. 818; Bishop v. Commissioner, 14 B. T. A.

arbitrary and capricious. Nor can it be deemed invalid on the assumption that Congress has acted arbitrarily in drawing the line between all gifts made within two years of death and those made before. Congress cannot be held rigidly to a choice between taxing all gifts or taxing none, regardless of the practical necessities of preventing tax avoidance, and regardless of experience and practical convenience and expense in administering the tax. Even the equal protection clause of the Fourteenth Amendment has not been deemed to impose any such inflexible rule of taxation.

The very power to classify involves the power to recognize and distinguish differences in degree between those things which are near and those which are remote from the object aimed at. *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322; see *Miller* v. *Wilson*, 236 U. S. 373, 384. It has never occurred to anyone to suggest that a state could not, by statute, fix the age of consent, or the age of competence to make a will or conveyance, although some included within the class selected as competent might be less competent than some who are excluded. In the exercise of the police power, classification may be based on mere numbers or amounts where the distinction between the class appropriately subject to classification and that not chosen for regulation, is one of degree.[22]

As all taxes must be levied by general rules, there is a still larger scope for legislative action in framing revenue laws, even under the Fourteenth Amendment, with its guarantee of equal protection of the laws. The legislature may grant exemptions. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 300; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, 289; *Missouri* v. *Dockery*, 191 U. S. 165. It may impose graduated taxes on gifts, inheritances, or on income. *Bromley* v. *McCaughn*, 280 U. S. 124; *Knowlton* v. *Moore*, 178 U. S. 41, 109; *Brushaber* v. *Union Pacific R. Co.*, 240 U. S.

130; Fincham v. Commissioner, 16 B. T. A. 1418; Hunt v. Commissioner, 19 B. T. A. 624; Siegel v. Commissioner, 19 B. T. A. 683; Polk v. Miles, 268 Fed. 175; Fidelity & Columbia Trust Co. v. Lucas, 7 F. (2d) 146; Appeal of Starck, 3 B. T. A. 514.

[22]Miller v. Schoene, 276 U. S. 272; Reinman v. Little Rock, 237 U. S. 171; Welch v. Swasey, 214 U. S. 91. Consider also Euclid v. Ambler Realty Co., 272 U. S. 365; Missouri, K. & T. R. Co. v. May, 194 U. S. 267; Murphy v. California, 225 U. S. 623; Keokee Consolidated Coke Co. v. Taylor, 234 U. S. 224, 227. And see particularly the cases collected in footnote 1 of the dissenting opinion of Mr. Justice Brandeis in Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 42-44.

1, 25; see also *Stebbins* v. *Riley*, 268 U. S. 137.[24] It may impose a tax that falls more heavily on ownership of chain stores than on ownership of a smaller number. *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Great Atlantic & Pacific Tea Co.* v. *Maxwell*, — U. S. —, decided October 26, 1931. And generally it may create classes for taxation wherever there is basis for the legislative judgment that differences in degree produce differences in kind.[25]

The purpose here being admittedly to impose a tax on a privilege—that of making gifts *inter vivos*—to the extent that its exercise substantially impairs the operation of the tax on estates, it was for Congress to say how far that impairment extends and how far it is necessary to go in the taxation of gifts either to prevent or to compensate for it. Unless the line it draws is so wide of the mark as palpably to have no relation to the end sought, it is not for the judicial power to reject it and substitute another, or to say that no line may be drawn.

The objection that the gifts are taxed as a part of the donor's estate, and at the same rates and on values as of the donor's death, has no more force than that made to the selection for taxation of gifts made within two years of death. Since the basis of the tax is that it compensates for the drain on the estate tax, and since it is paid by the donor's estate, which would otherwise be com-

[24]Other types of graduated taxes have been upheld in Clark v. Titusville, 184 U. S. 329, 331; Metropolis Theater Co. v. Chicago, 228 U. S. 61, 69-70. And see Salomon v. State Tax Commission, 278 U. S. 484; Keeney v. New York, 222 U. S. 525, 536; McCray v. United States, 195 U. S. 27. See also McKenna v. Anderson, 31 F. (2d) 1016, cert. den. 279 U. S. 869; F. Couthoui, Inc. v. United States, — Ct. Cl. — (December 7, 1931), cert. den. — U. S. —, March 21, 1932 (No. 645, October Term, 1931).

[25]Instances of classification for taxation dependent on numbers or amounts are Quong Wing v. Kirkendall, 223 U. S. 59; Citizens' Telephone Co. v. Fuller, 229 U. S. 322. See Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237. Taxing statutes have been upheld even though the subject of taxation was valued in a manner not necessarily related to real value, where administrative necessities have made such classification desirable. Hatch v. Reardon, 204 U. S. 152; New York v. Latrobe, 279 U. S. 421; International Shoe Company v. Shartel, 279 U. S. 429; Paddell v. New York, 211 U. S. 446. An annual excise tax on the privilege of selling cigarettes, applicable to retailers and not wholesalers, has been held constitutional, even though set at a flat amount which bore more heavily on small dealers than on large. See Cook v. Marshall County, 196 U. S. 261.

pelled to pay the estate tax on transmission at death, the whole object of the tax on the gifts would be defeated if levied on another basis. In determining the reasonableness of a tax which, like this one, is levied in lieu of another, it is of course necessary to consider all the statutes affecting the subject matter. *Interstate Busses Corporation* v. *Blodgett*, 276 U. S. 245; *Farmers & Mechanics Savings Bank* v. *Minnesota*, 232 U. S. 516, 529. Where the very purpose and justification of the one tax is that it is compensatory for the loss of the other, it is no objection that the one is made the exact equivalent of the other, thus avoiding inequality which, under some circumstances, might be objectionable. See *General American Tank Car Co.* v. *Day*, 270 U. S. 367. No one has yet indicated precisely in what way this method of measuring the tax works any greater injustice or hardship than the tax on estates. It is certainly not greater where, as here, the tax is paid from the estate of the donor who, regardless of his age, in giving away his property after the statute was in force, took his chances that death within two years would bring it into his estate for taxation where it would have been if the gift had not been made. See *Milliken* v. *United States*, *supra*, pp. 23, 24. A very different case would be presented if the taxed gift were made before the enactment of the taxing statute and many years before the death, as in *Frew* v. *Bowers*, 12 F. (2d) 625, 630.[26] See Nichols v. *Coolidge*, *supra*. The application of the estate tax to the other types of gift *inter vivos* mentioned in the Act has uniformly been upheld, even though the gift was made more than two years before death. *Milliken* v. *United States*, *supra*; *Phillips* v. *Dime Trust and Safe Deposit Co.*; *Tyler* v. *United States*, *supra*; *Reinecke* v. *Northern Trust Co.*, *supra*; *Chase National Bank* v. *United States*, *supra*.

I cannot say that the tax on all gifts made in contemplation of death, supplemented by that imposed on all others made within two years of death, is not adapted to a legitimate legislative object. The history of the litigation over gifts made in contemplation

[26] In this case the Government sought to collect the tax on a trust created before the estate tax was passed, and twelve years before the settlor's death. Judge Learned Hand, concurring, said, p. 630: "As to transfers made after the law went into effect, I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed it appears that the result is too whimsical to stand. There are settlements which the settlor outlives for 30 or 40 years."

of death, to which reference has been made, and the reports of Congressional Committees prepared after extensive investigation and with expert aid, plainly indicate that it is. I can find no adequate reason for saying that the tax is invalid. The denial of its validity seems to me to rest on no substantial ground and to be itself an arbitrary and unreasonable restriction of the sovereign power of the Federal Government to tax, for which neither the words of the Fifth Amendment nor any judicial interpretation of it affords justification.

The questions should be answered in the negative.

Mr. Justice BRANDEIS joins in this opinion.